

and it is now for the most part covered with valuable timber and susceptible of cultivation."

5.

It is true that since Tennessee and Arkansas were admitted into the Union many changes have occurred in the course and banks of the Mississippi River, and while some of said changes were by erosion and accretion, nevertheless, changes from such causes did not occur at all the places designated in the five subdivisions of the fifth paragraph of the bill, which respondent now specifically answers:

- (1.) It is true that considerable portions of Dean's Island on the east and southeast sides thereof had been gradually worn or washed away by the waters of the river.
- (2.) Respondent denies that there had been, as alleged in the bill, erosions into the Tennessee bank opposite the south and west part of Dean's Island, which had caused said shore line to recede, and Dean's Island to increase by accretions, whereby Tennessee lost and Arkansas gained; but on the contrary she avers that some changes had been made in the shore line on the Tennessee side, immediately south and west of Dean's Island, but not southwest thereof, and she further avers that such changes as had occurred on the Tennessee shore prior to 1876 were the result of avulsions and not of erosions, and therefore Tennessee did not lose nor Arkansas gain thereby.
- (3.) It is true that there had been some considerable erosion into the Arkansas shore or bank north of and opposite to Island 37 and a corresponding, or greater, addition by accretion to said island.
- (4.) Whether there had been accretions to the Arkansas bank and erosion into the Tennessee shore at the place called Plum Island No. 38, respondent is not advised, and therefore

can neither admit nor deny the allegations of the fourth subdivision of the fifth paragraph, but demands proof thereof.

(5.) It is true, as respondent is informed, that between the places called Devil's Elbow and Brandywine Point, the Arkansas bank or shore had lost and receded by erosion, and the Tennessee shore had correspondingly, or in a greater degree, gained by accretions.

6.

Respondent denies that all the changes in the Mississippi River prior to 1876 at what complainant calls the *locus in quo*, were gradual and imperceptible, as alleged in the sixth paragraph of the bill.

It is admitted, however, that the sudden change or "cut-off" made on March 7, 1876, was an avulsion, which did not carry the boundary line between the States to the middle of the new bed or channel, but, as respondent avers, said boundary line remained in the abandoned bed or channel, so that when the waters disappeared therefrom the lands formerly submerged and covered by the river belonged, wherever the lands could be identified, to the original owners.

It is true that the boundary line between complainant and respondent, that is, the line dividing the land belonging to the two States, has not been run or traced, and while prior to the filing of the bill in this cause respondent had not understood that the location of the boundary line as claimed by her was disputed by complainant, nevertheless, it is admitted that the lapse of time adds to the difficulty of accurately tracing and definitely locating said line, and that the same should be authoritatively determined, run, and marked.

7.

Further answering said bill and particularly the seventh and eighth paragraphs thereof, respondent shows unto your

honors that while it is true that, prior to the avulsion of 1876, above mentioned, the boundary line between the States of Tennessee and Arkansas, at the *locus in quo*, was "the middle of the Mississippi River," or "the middle of the main channel" of said river—which expressions or descriptions mean the same thing—as it then flowed, and that said avulsion did not carry the boundary line between the States to the middle of the new channel or bed of the river, nevertheless, respondent denies, if it was meant to be so alleged in the seventh paragraph of the bill, that the effect of said avulsion was to fix the boundary line between the States in the bed of the old channel at a point immediately under the center of the water as it then flowed, without taking into consideration the existence or absence of accretions on either side of the river, or giving effect to the rule of law which restores submerged lands, upon the disappearance of waters therefrom, to the original owners to the extent of their boundaries, where the same can be ascertained and definitely located.

Inasmuch as complainant does not state fully or with entire accuracy the claims and contentions of respondent with respect to the principles controlling the fixing or location of the boundary between the two States, either generally or as applied to that particular part of the boundary referred to by complainant as the *locus in quo*, respondent deems it proper to state briefly the general rule insisted upon by her, and shows its application to the particular *locus in quo*, and it will be helpful to a clearer understanding of these matters to review briefly in connection therewith some of the litigation, both in the Federal and State courts, in which the rule or contention relied upon by respondent has been repeatedly declared and applied.

It is the contention of respondent that the west boundary of the State of Tennessee, declared and fixed by treaties and legislative enactments to be "the middle of the Mississippi River," and the east boundary of the State of Arkansas declared and fixed by treaties and legislative enactments to be

"the middle of the main channel of the Mississippi River," are coincident lines, making the boundary between the two States upon a line along the middle of the main channel or bed of the river equidistant from the visible, defined and substantially established banks, within which the waters are confined and flow in their natural and ordinary stages, and do not mean a line along the center or middle of that part of the river which, because it is deepest, may constitute at any given time the channel of commerce. This proposition, respondent respectfully submits and insists, is the rule of property declared by the Supreme Courts of both States in determining their respective western and eastern boundaries—by the Supreme Court of Tennessee in the case of the State of Tennessee *vs.* Muncie Pulp Company *et al.*, 119 Tenn., 47-134, and by the Supreme Court of Arkansas in the case of Cessill *vs.* State, 40 Ark., 501.

That where lands have been submerged by erosion, or are covered by water, as the bed of a stream, and emerge therefrom, they are restored to the former proprietors or owners to the extent of the lines of their property where the same can be identified; so that upon the happening of the avulsion in 1876 the boundary line between the States of Tennessee and Arkansas in the abandoned channel of the river is to be located midway between the banks of said river, as they existed in 1823, for the reason that the bank or shore lines, that is, the property lines, as they existed in 1823, are susceptible of definite and accurate identification, as shown by the Humphrey's map, hereinbefore made a part of this answer and exhibited thereto. These are the propositions of law—the claims—upon which respondent has ever relied for the determination of her western boundary, and which she has sought to apply and has applied in the civil action referred to by complainant in the seventh paragraph of her bill.

Inasmuch as by the eighth paragraph of her bill complainant refers to a suit instituted by respondent in December, 1903, in the Chancery Court of Tipton County, Tennessee,

against one W. A. Cissna, and the adjudication of the Supreme Court of Tennessee therein as the occasion or cause for bringing this suit, and makes no reference to the antecedent litigation involving the *locus in quo*, it is proper to call to the attention of your honors that in 1901 W. H. Stockley brought an action of ejectment against the said W. A. Cissna in the Circuit Court of the United States for the Western District of Tennessee, at Memphis, to recover a part of this same *locus in quo*, and in said action of ejectment the plaintiff Stockley claimed the lands in the old bed of the river as accretions to certain riparian tracts owned by him, and also by virtue of a grant from the State of Tennessee issued in 1901, after the old bed of the river had become dry land as the result of the avulsion of 1876, and while the defendant Cissna pretended to claim the premises in dispute between him and Stockley as accretions to Dean's Island, and had filed a plea in abatement to the jurisdiction of the court on the ground that the land was in Arkansas, such plea was withdrawn by him and at the trial he relied solely upon his plea of "not guilty," which, under the rules of practice in ejectment cases, compelled plaintiff to show a perfect title in himself, and permitted defendant to show an outstanding title in another.

Upon the issues thus made in said case of Stockley *vs.* Cissna, there was a verdict in favor of the defendant, which, upon appeal to the Circuit Court of Appeals for the Sixth Circuit of the United States, was affirmed by that court upon substantially the following grounds:

(1) That the *locus in quo* was and is on the Tennessee side of the middle line of the old channel of the Mississippi River and within the boundary of the State of Tennessee.

(2.) That under the laws of Tennessee the bed of a navigable stream below low-water mark belongs to the State, and where, as the result of an avulsion, the channel of a stream is changed and the old bed emerges from the water it is the

property of the original owners or proprietors to the extent of the original boundaries where such lines can be identified.

(3.) That the shore or bank lines as they existed in 1823, being identified as shown on the Humphreys map, the land lying between low-water mark of the Tennessee shore and the middle of the old channel of the Mississippi River, as these points were shown to exist in 1823, belonged to the State of Tennessee, and was not subject to grant within the meaning of the laws of Tennessee authorizing the issuance of grants for unappropriated or vacant lands, and therefore that the grant issued to Stockley in 1901 was void, and he took nothing thereunder.

The opinion of the Circuit Court of Appeals for the Sixth Circuit in said case of Stockley *vs.* Cissna is reported in 119 Fed. Rep., pp. 812 to 841, to which reference is here made.

The map of Major J. H. Humphreys, hereinbefore referred to, was filed in and made a part of the record in said case of Stockley *vs.* Cissna, and was substantially approved by the said Circuit Court of Appeals, and made a part of its opinion; and said map not only showed conditions as they existed in 1823, but also that part of the old bed of the Mississippi River sought to be recovered by Stockley, and in order that your honors may more clearly understand the scope of the opinion and judgment of the Circuit Court of Appeals in said case of Stockley *vs.* Cissna, respondent herewith files as Exhibit B to this answer another copy of said map, showing not only the conditions existing in 1823, but also, enclosed in red lines, that part of the old bed of the Mississippi River sought to be recovered by Stockley as aforesaid, but held by said court to be the property of the State of Tennessee. The original Humphreys map also partially showed the course taken by the river as the result of the avulsion in 1876, which, in our opinion, is not material to the present controversy, and therefore has been omitted from the copies of said map exhibited with this answer.

The decision by the Circuit Court of Appeals in Stockley *vs.* Cissna was rendered in 1902, and called to the attention of the State of Tennessee that part of her public domain had been taken possession of by the said Cissna, and thereupon in 1903 the suit referred to in the eighth paragraph of the bill was brought by respondent against said Cissna and the Munice Pulp Company, claiming under him, to recover possession of said land now claimed by said Cissna as accretions to Dean's Island, of which the bill alleges he also claims to be the owner.

To the suit so instituted by respondent the defendants filed a plea in abatement to the effect that the lands sued for were in the State of Arkansas. The lands so sued for by respondent are embraced within the letters, A, B, C, D, E, F, G, and H, on Exhibit B hereto, the line B-C representing the mid-channel of 1823, the boundary line between the States.

Upon the issues made by the bill and plea in abatement proof was taken and the lower court decided in favor of the contention made by the defendants, but upon appeal to the Supreme Court of Tennessee that court, in September, 1907, approving the principles laid down by the Circuit Court of Appeals in Stockley *vs.* Cissna, *supra*, reversed the judgment of the lower court and remanded the cause for further proceedings in accordance with its opinion, which is officially reported in 119 Tenn., p. 47.

The propositions declared and adjudged by the Supreme Court of Tennessee in said case, as shown in its said opinion, are substantially as follows:

(1.) That the western boundary of the State of Tennessee, declared and fixed by treaties and legislative enactments to be "the middle of the Mississippi River," and the eastern boundary of the State of Arkansas, declared and fixed by treaties and legislative enactments to be "the middle of the main channel of the Mississippi River," mean a line along the middle of the main channel or bed of the river equi-

distant from the visible, defined and substantially established banks within which the waters are confined and flow in their natural and ordinary stages, and do not mean the center of that part of the river which, because it is deepest, may at any given time constitute the channel of commerce.

(2.) That the title to the bed of said river between low water mark on the eastern shore and said middle line was in the State of Tennessee.

(3.) That the said avulsion of 1876 did not change the boundary line from the old bed to the new channel.

(4.) That where lands have been submerged or covered by water, as the bed of a stream, and the waters have disappeared therefrom, they are restored to the original owners to the extent that the property lines can be ascertained and identified.

(5.) That the presumption is in favor of the permanence of boundary lines, and the burden of proof is upon the party averring that the location of such lines had been changed by the action of the forces of nature.

(6.) That no accretions are shown to have been made to Dean's Island previous to 1876, the date of the avulsion.

(7.) That the boundary line between the States of Tennessee and Arkansas at the point in dispute is a line along the old channel midway between the banks of 1823, as shown by the Humphreys map set out in the opinion of the court, containing the earliest record and best evidence of the location of said banks, and that the lands between the low-water mark on the bank of 1823 and the "middle of the river" as it then was belong to and are the property of the State of Tennessee.

As hereinbefore shown, the case of State of Tennessee *vs.* Muncie Pulp Company and W. A. Cissna was remanded to the Chancery Court of Shelby County for further proceedings in accordance with the opinion of the Supreme Court hereinbefore referred to, and in due course an answer was filed making practically the same defense as that set up in the plea in abatement, and the cause coming on to be heard upon the issues raised by the bill and answers and the evidence on file in the cause, a decree was rendered by the Chancery Court of Shelby County in favor of the State of Tennessee and against said defendants Cissna and Muncie Pulp Company for the land sued for as part of the old bed of the Mississippi River embraced within the letters A, B, C, D, E, F, G, and H upon Exhibit B hereto, and upon appeal of the defendants to the Supreme Court of Tennessee said decree was affirmed by said court at its April term, 1912.

And now respondent pleads and relies upon the record and judgment in the case of Stockley *vs.* Cissna, decided by the United States Circuit Court of Appeals for the Sixth Circuit in 1902, as hereinbefore shown, and upon the record and judgments in the case of the State of Tennessee *vs.* Muncie Pulp Company and W. A. Cissna, determined by the Supreme Court of Tennessee, as hereinbefore set out, as judicial determinations and evidence of the boundary line between the States of Tennessee and Arkansas at the particular place involved in said suits:

8.

The equity and justice of the rule contended for and sought to be applied by respondent in the case of a channel or bed of a navigable river abandoned as the result of an avulsion, and where there have been no accretions on either side of said river, which, however, has become widened by gradual erosions into one or both of its banks, by reason of which original shore lines have disappeared, are shown by the holdings of the United States Circuit Court of Appeals

and of the Supreme Court of Tennessee in the cases above mentioned and the results therefrom, which respondent now respectfully calls to the attention of your honors.

There had been no accretions, as respondent avers, to Dean's Island, or the main Arkansas shore, and it is conceded that the bank lines and width of the river in 1823 are correctly shown by Humphreys' map, and that the exact location of said bank lines and the width of the river at any other time cannot be definitely ascertained.

Therefore, under the rule contended for by respondent in such case, when, as the result of the avulsion in 1876, the waters receded not only from the old, or 1823, bed of the river, but also from the lands submerged either by gradual erosion into the banks of said river or the result of avulsions, the riparian owners were restored to their lands to the extent of their original boundaries, that is, the banks of 1823, and between said banks and the center of the river of that date the abandoned bed or channel was restored in equal moieties to the States of Tennessee and Arkansas.

To further illustrate: To Arkansas was restored the land on her side from high-water mark, that being the rule of property in Arkansas (*Railroad vs. Ramsey*, 53 Ark., 314), in 1823 to the middle thread of the river of that year; Tennessee regained on her side from *low-water mark* to the midchannel of 1823, and the original riparian owners on both banks recovered the lands lost to them by erosion or avulsion to the extent of the original lines of their several tracts as granted by said States.

9.

Respondent, upon information, denies that prior to the avulsion of 1876 there had been any permanent addition to, or enlargement of, the Arkansas shore or bank by accretion along what complainant calls the *locus in quo*, and avers that at many places, some of which are admitted in the bill, there had been permanent gains to the Tennessee shore by grad-

ual and imperceptible accretions, by which said shore was extended beyond the bank of 1823.

10.

The *locus in quo*, so called by complainant in her bill, lies between the County of Tipton, in Tennessee, and the State of Arkansas, and it would seem that complainant's bill seeks only a decision as to, or the location of, the boundary line between the States along the so-called *locus in quo*; but upon information believed by your respondent she further shows unto your honors that at different times since the admission of Arkansas into the Union avulsions have occurred along the boundary line between the States of Tennessee and Arkansas at other places, to wit, along the boundary line between the Counties of Dyer, Lauderdale, and Shelby, in the State of Tennessee, and the State of Arkansas, by which the bed of the channel of the river as it existed in 1823 and in 1836 was abandoned, so that said former bed at several places has become, in years long past, dry land, susceptible of cultivation, and bearing timber of considerable value; and that at such places the exact boundary between the States is a matter of doubt resulting in confusion as to the ownership of lands and in obstructions to the execution of process and the administration of the laws of the two States;

So that it is to the interest of both States that the boundary line between them at all of such places should be determined, run, and marked, and, as respondent respectfully insists, in accordance with the principles hereinbefore contended for by her as governing the determination and location of the boundary between the two States.

11.

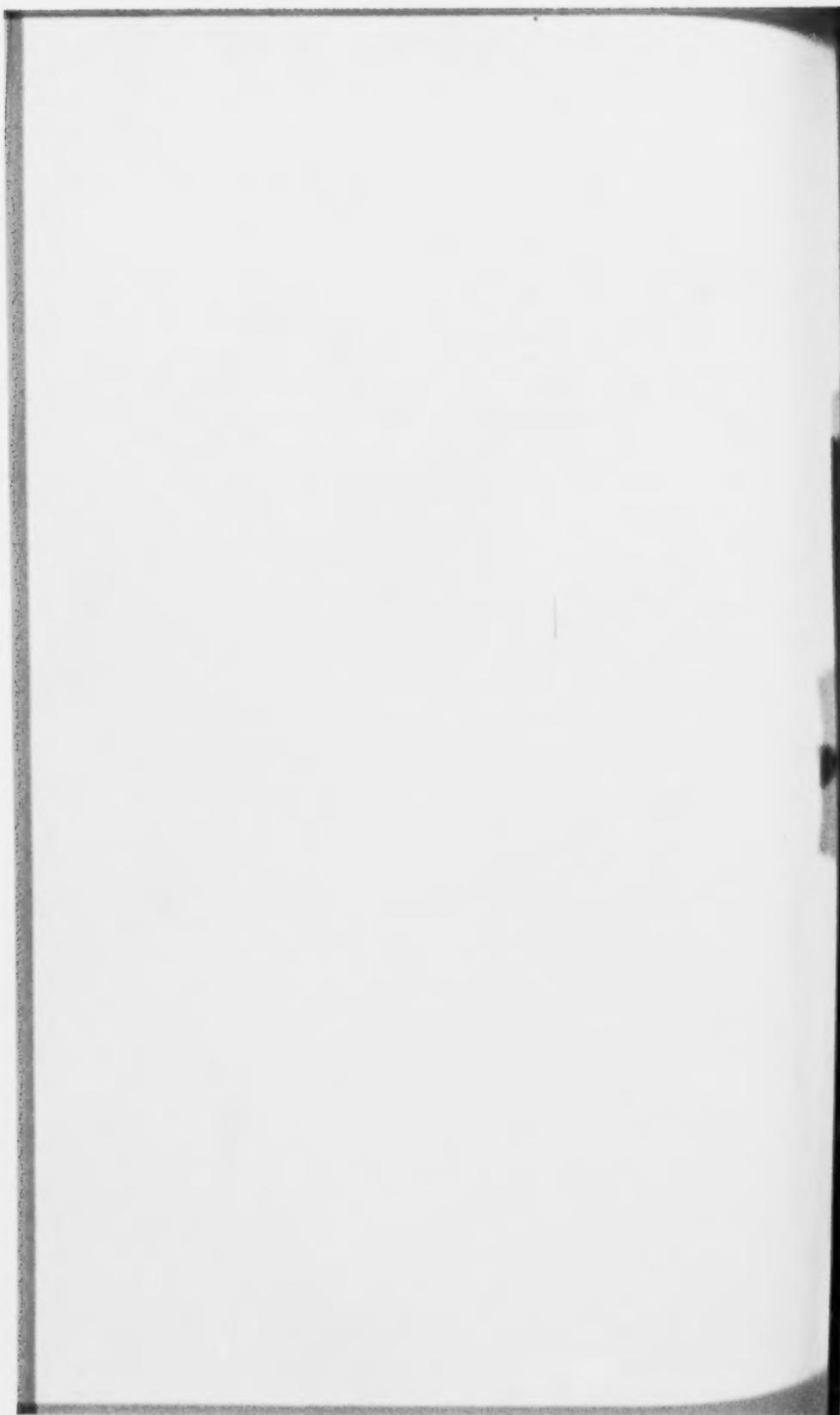
Therefore, in view of the premises, respondent prays that this her answer may be taken and considered, under the rules of this court, as a counter-claim, in the nature of a

cross-bill, seeking affirmative relief to the end that the boundary line between the two States may be located and established, run and marked, in accordance with the principles hereinbefore submitted by your respondent as governing the determination or location of said boundary line, and for all such orders and decrees as may be necessary to effectuate her special prayer, and for such other, further, and general relief as in equity and good conscience she may be entitled to upon the facts herein stated.

CHARLES T. CATES, JR.,
Attorney General of Tennessee.

G. T. FITZHUGH,
ALBERT W. BIGGS,
G. J. McSPADDEN,
Of Counsel.

(Here follow maps marked Exhibits A and B.)



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FOLD OUT IS TOO LARGE TO BE FILMED

1

STATE OF TENNESSEE,
County of Davidson:

Personally came and appeared before me, the undersigned authority in and for said county and State, Ben W. Hooper, who, on oath, states that he is the Governor of the State of Tennessee; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein contained and alleged are true as therein alleged and stated, to the best of his knowledge and belief.

BEN W. HOOPER.

Subscribed and sworn to before me this 28 day of March, 1913.

[Seal Fred H. Phillips, Jr., Notary Public, Davidson Co., Tenn.]

FRED H. PHILLIPS, JR.,
Notary Public.

[Endorsed:] Supreme Court U. S., October term, 1912.
Term No. 7, original. The State of Arkansas, complainant, *vs.* The State of Tennessee. Answer of defendants.

[20949]

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SUPREME COURT OF THE UNITED STATES

October Term, 1913.

12
Orig.
New Original

THE STATE OF ARKANSAS, Complainant,

vs.

THE STATE OF TENNESSEE, Defendant.

Brief and Argument in Behalf of the State of Tennessee
on the Motion by the State of Arkansas to settle
the Principles by Which the Boundary Line
Between Complainant and Defen-
dant is to be Ascertained.

FRANK M. THOMPSON,
Attorney General.

ALBERT W. BIGGS,
G. T. FITZHUGH,
G. J. McSPADDEN,
Solicitors for the State of Tennessee.



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SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1913.

THE STATE OF ARKANSAS, Complainant,
vs.
No. 7, Original.
THE STATE OF TENNESSEE, Defendant.

BRIEF AND ARGUMENT IN BEHALF OF THE STATE
OF TENNESSEE ON THE MOTION BY THE STATE
OF ARKANSAS TO SETTLE THE PRINCIPLES
BY WHICH THE BOUNDARY LINE
BETWEEN COMPLAINANT AND
DEFENDANT IS TO BE
ASCERTAINED.

May It Please the Court:

The case is presented on the motion of the State of Arkansas to settle on bill, answer and replication the principles by which the boundary line between the complainant and defendant is to be ascertained.

The controversy arises by reason of an avulsion in the Mississippi River which occurred on the 7th of March, 1876, whereby the river cut through the narrow neck of land separating its stream before and after its flow around what was known as Devil's Elbow. The result of this avulsion was that the river gradually abandoned its

old bed, which prior to the filing of the bill had gradually filled up, and is now covered with valuable timber. The avulsion is graphically described in the opinion of the Circuit Court of Appeals for the Sixth Circuit, in the case of *Stockley v. Cissna*, 119 Fed. 812, which opinion was written by Judge (now Mr. Justice) Lurton. Also, in the case of *State of Tennessee v. Muncie Pulp Company*, 119 Tenn. 47, opinion by Mr. Justice Shields.

The result of this motion for the court to determine from the pleadings the law to govern in the establishment of the boundary line, is that all the facts alleged in the answer are admitted.

Iowa v. Illinois, 147 U. S. 1, 7.

It is necessary, therefore, to see what are the admitted facts before the principles of law which are to govern are discussed.

THE FACTS.

The bill and answer establish the following facts:

At the date of the admission of Arkansas into the Union (1836) and prior thereto, the main channel of the Mississippi river flowed south of Dean's Island, which was on the Arkansas side, and north of Island No. 36 on the Tennessee side, and turning north, flowed around Island No. 37, leaving it on the left, or Tennessee, side of the river, with a smaller channel known as McKenzie chute separating Island No. 37 from the main Tennessee shore. The course of the river and the land upon each

side of the river, as well as the width of the river, in the year of 1823, are accurately shown by the Humphrey's map filed as Exhibit A to the answer of the State of Tennessee.

It is conceded that between 1823 and 1836 the Mississippi river had not changed its course around Dean's Island and Devil's Elbow, and that its course at that time was substantially the same as it was at the date of the admission of Tennessee to the Union in 1796.

The bill avers that between the years of 1836 and 1876 there had been changes in the course of the river, alleged to be due to accretions to Dean's Island on the Arkansas shore and erosions on the opposite Tennessee shore, whereby the main channel of the river had been deflected through McKenzie chute. These changes are alleged to be shown by what is called Suter's map, exhibited with the original bill (O. B., p. 4).

The answer denies these allegations, and especially that there had been any accretions to the west of Dean's Island, or that the main channel of the river, or the channel of commerce, had been changed or deflected through McKenzie chute. (Ans. pp. 3 4).

The bill specifically alleges changes by accretion and erosion prior to 1874 and 1876, and the answer, while admitting that certain changes had occurred in the course and banks of the river, some of which were by erosion and accretion, does not admit, but denies that the changes which did occur around Dean's Island and on the south and west side, were from such causes, and specifically answering Section 5 of the bill, Tennessee says:

1. She admits that considerable portions of the eastern and southeastern part of Dean's Island had been gradually worn or washed away by the waters of the river, but,

2. Denies there had been erosions into the Tennessee bank opposite the south and west part of Dean's Island causing said shore line to recede and Dean's Island to increase by accretion, but that such changes on the shore line on the Tennessee side to the south and west, but not southwest of Dean's Island, as had occurred prior to 1876, were the result of avulsion and not of erosion.

3. She admits that there had been erosions on the Arkansas shore or bank opposite the north or upper end of Island No. 37, and a corresponding, if not even greater addition, by accretions to that island, while,

4. As to erosions into the Tennessee shore at Plum Island No. 38, not being advised, she neither admits nor denies the allegations of the bill, but calls for proof, and

5. Between the places called Devil's Elbow and Brandywine Point, the answer admits that the Arkansas bank or shore had lost and receded by erosion and the Tennessee shore gained by accretions. (1)

The bill charges that the changes in the river at what it

(1) The boundary line asked to be marked by the State of Arkansas is that around Dean's Island, and embraces the territory which was in litigation by one W. A. Cissna in the case of Stockley v. Cissna, 119 Fed., 812, and State vs. Pulp Company, 119 Tenn., 47. The answer by the State of Tennessee denying there had been any accretions to Dean's Island, as alleged in the bill, is sustained by the finding of both the Supreme Court of Tennessee and the Circuit Court of Appeals. (119 Tenn., p 115, et seq.; 119 Fed.)

is pleased to call the "*locus in quo*" were gradual and imperceptible, and the shifting of the middle of the main channel of the Mississippi River was likewise gradual and imperceptible, and the boundary line between the states of Tennessee and Arkansas followed said gradual and imperceptible changes; that the cut-off was an avulsion and left the boundary line between said states exactly as it was just preceding the avulsion, to-wit, "the middle of the main channel of the river as it then flowed." (O. B., p. 6).

The answer denies that all of the changes in the river were gradual and imperceptible, as alleged in the bill (See Section 5 of the bill for specific allegations upon this point), and avers that the boundary line between the states remained

"in the abandoned bed or channel, so that when the waters disappeared therefrom, the lands formerly submerged and covered by the river, belonged, where the lands could be identified, to the original owners." (Ans. p. 7).

The bill specifically states that the boundary line

"became fixed by the happening of the avulsion above mentioned, and said line, as it existed at the time immediately prior to said avulsion, is the true boundary between the states."

The State of Tennessee claims that all the changes in the river prior to 1876 were not imperceptible and due to erosion and accretion, that when the avulsion occurred it

did not carry the boundary line to the middle of the new channel, nor did it fix it in the bed of the old channel at a point immediately under the center of the water as it flowed on March 6th, 1876 (which was at flood stage), without taking into consideration the existence or absence of accretions on either side of the river, or giving effect to the rule of law which restores submerged lands upon the disappearance of the waters therefrom, to the original owners to the extent of their boundaries where the same can be ascertained and definitely located. (Ans. p. 8.)

The State of Tennessee contends that the west boundary of Tennessee is the middle of the Mississippi river, meaning the middle of the bed of the river; that the act admitting Arkansas into the Union did not, and could not, change the western boundary of the State of Tennessee; that the middle of the river, as thus used, is not the middle of the track of steamboat navigation, but a line along the middle of the main or navigation channel or bed of the river, equidistant from the visible, defined and substantially established banks within which the waters are confined and flow in their natural and ordinary stages, this line changing from time to time as the banks themselves change, by erosion or accretion. And when the avulsion occurred and the lands reappeared which had been submerged or lost by erosion, as the original lines were capable of being reproduced, the lands were restored to the original owners, and the boundary line to the middle of the main channel or bed as it was in 1823.

While the bill avers that the boundary line between Tennessee and Arkansas prior to the avulsion

"was the middle of the main channel of the Mississippi river as it then flowed," (O. B. p. 6).

and also, that

"the Mississippi river, a navigable stream, constitutes the boundary between the States of Tennessee and Arkansas, and the middle of the main channel of the stream marks the true boundary between said states (O. B. p. 7);

in the brief filed in support of her motion the State of Arkansas takes the position, as we understand it, that the boundary line prior to the avulsion, and now is, the center of the deep-water channel, or the line of steamboat navigation. (Brief, pp. 8, 14, 21, 22, 25).

QUESTIONS PRESENTED FOR DECISION.

So the questions presented to the court for consideration are:

1. Is the boundary between the States of Tennessee and Arkansas, (a) the middle of the main channel or bed of the river? or (b) the center or middle of the deepest water? or (c) the center of the track of steamboat navigation?

If it is the first, it is subject to change as the result of accretions and erosions, while if it is the second, it is subject to change by reason of the shifting sands which

constitute the bed or bottom of the river; while if it is the third, it not only changes by reason of the shifting of the sands in the bed of the river, but from time to time with different stages, being at one place at low water, at another place at high water, and still at another place at the flood stage. *This line is known only to the experienced river pilots and is constantly changing.*

2. When the avulsion occurred and the boundary line between the states became fixed in the abandoned bed of the river, is that line now to be ascertained,

(a) by the only feasible and practicable plan, which at the same time gives effect to the well established rule of reliction, by taking the center of the river as it flowed in 1823 and 1836, or

(b) taking the center of the river bed (if it can be determined and ascertained) as it flowed in 1876 prior to the cut-off, or,

(c) attempting to locate where the steamboat channel was prior to the avulsion in 1876.

If the latter, then, is the steamboat track at the flood state preceding the avulsion to be taken, or the track of navigation at the extreme low water of 1874, and if neither, then at what stage, and, if either, how is it to be ascertained?

BRIEF.

1. The western boundary of Tennessee is the same as the western boundary of the colony of North Carolina as defined in the treaty between Great Britain, France and Spain, made in February, 1763, towit: a line "drawn along the middle of the Mississippi river."

3 Jenkinson's Treaties, 177.

Also, as set forth in treaty made with Great Britain, November 30, 1782, where the western boundary of the United States is thus described:

"*Thence by a line to be drawn along the middle of said river Mississippi until it shall intersect the northernmost part of the 31st degree of north latitude.*"

See *Treaties and Conventions between United States and Other Powers since July 4, 1776*, Government Printing Office, Washington, 1889, p. 371.

The "middle of the Mississippi river," as thus described in the two treaties, was construed and interpreted in the treaty between the United States and Spain concluded October 27, 1795, to mean, the middle of the channel or bed of the said river, for by Art. IV. of the said treaty it was provided:

"It is likewise agreed that the western boundary of the United States which separates them from the Spanish colony of Louisiana is in the middle of the channel or bed of the Mississippi River, from the

northernmost boundary of said states to the completion of the 31st degree of latitude north of the equator."

(Italics are ours.)

See *Treaties and Conventions Concluded Between United States and Other Powers, supra*, p. 1007.

2. The western boundary of the United States was the western boundary of North Carolina, which state in 1789 authorized her Senators in Congress to convey all her territory west of a certain line to the United States, and which they did convey on February 25, 1790, by a conveyance which was accepted by an Act of Congress passed for that purpose April 2d, 1790. 1st Statutes, 106 ch. 6.

3. The inhabitants of this territory organized as a state and adopted a constitution February 6, 1796, which described the territory or boundaries of the new State of Tennessee in the language of the session act, and she was admitted into the Union as a sovereign state by Act of Congress passed June 1, 1796. 1st Statutes 491, ch. 47.

4. By the treaty for the cession of Louisiana to the United States, concluded April 30, 1803, France ceded to the United States the colony or province of Louisiana to the same extent that it was possessed by Spain on the 1st of October, 1800, "and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other states."

Treaties and Conventions Between United States and Other Powers, p. 331.

5. The act admitting the State of Arkansas into the

Union describes its eastern boundary as "the middle of the main channel of the Mississippi river." Fifth Statutes, 50, ch. 100.

6. It was not the intention of Congress by using the words "the middle of the main channel of the Mississippi river" to change the western boundary line of Tennessee as it then existed, because Congress was without power to change the boundaries of Tennessee as they were fixed when that state was admitted to the Union in 1796.

Constitution of United States, Art. IV., Sec. 3;
Louisiana v. Mississippi, 202 U. S. 40;
Washington v. Oregon, 211 U. S. 127, 134.

7. Where a navigable river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream.

Handley v. Anthony, 5 Wheat. 374;
Woolsey on International Law, Sec. 58;
Halleck's Int. Law, p. 146;
Wheaton's Elements of Law, ch. IV., Sec. 11,
p. 346;
Iowa v. Illinois, 147 U. S. 1, 7;
Nebraska v. Iowa, 143 U. S. 359;
Louisiana v. Mississippi, 202 U. S. 1;
Missouri v. Nebraska, 196 U. S. 23, 35;
Washington v. Oregon, 211 U. S. 127, 134.

8. But there is no fixed rule making the boundary between two states the middle of the channel.

See authorities, *supra*; especially
Handley v. Anthony, 5 Wheat. 374;
Indiana v. Kentucky, 136 U. S. 479, 507, 508.

9. The rule undoubtedly is that where the middle of the channel is the dividing line between states or the boundary between nations, it continues such, notwithstanding accretion and erosion of its banks.

Authorities, section 7, *supra*.

10. Whatever meaning the court, in the absence of a convention or agreement, might give to the term "the middle of the river Mississippi," or "the middle of the main channel of the Mississippi river," so far as the boundary line between Tennessee and Arkansas is concerned, this has been construed to mean the middle of the bed of the river equidistant from the visible, defined and substantially existing banks within which the waters are confined and flow at their natural and ordinary stages, and not the middle of the channel of commerce, or the track of steamboat navigation.

See *Treaty Between Great Britain, France and Spain*, February, 1763, 3 Jenkinson's Treaties, 177;

Also, *Treaty with Great Britain*, Nov. 30, 1782; *Treaties and Conventions Between U. S. and Other Powers, etc.*, p. 371;

Also *Treaty Between United States and Spain*, October 27, 1795, Art. IV.;

Treaties and Conventions Between U. S. and Other Powers, p. 1007;

Cessill v. The State, 40 Ark. 501, 503, 504, 505; *Wolfe v. State*, 104 Ark. 140;

Moss v. Gibbs, 10 Heisk. 283;

Foppiano v. Speed, 113 Tenn. 167;

Morgan v. Reading, 3 Sm. & Mar. (Miss.) 366;

Myers. v. Perry, 1 La. Ann. 372;

State v. Muncie Pulp Company, 119 Tenn. 47, 69, 95.

11. Where there is more than one channel, caused by islands, it means the main or principal channel as it existed in 1796, 1823 and 1836.

Missouri v. Kentucky, 11 Wall. 395;
St. Louis v. Rutz, 138 U. S. 236;
Indiana v. Kentucky, 136 U. S. 479.
Moss v. Gibbs, 10 Heisk. 283.

12. The boundary line between the States of Tennessee and Arkansas has been settled by the duly constituted authorities of said states by judicial decisions of both states and other authorized official action, long acquiescence, the exercise of jurisdiction unchallenged, and other acts amounting to an agreement or convention, to be the middle of the main channel or bed of the river, and not the center of that part of the river which is deepest and which constitutes the channel of commerce.

See authorities Section 10, *supra*;

Also see

Rhode Island v. Mass., 4 How. 591, 639;
Indiana v. Kentucky, 136 U. S. 479;
Virginia v. Tennessee, 148 U. S. 503, 522, 523;
Louisian v. Mississippi, 202 U. S. 1, 53;
Maryland v. West Virginia, 217 U. S. 1, 41, 43.

When an avulsion occurs and the river leaves its old bed or channel and makes for itself a new channel wholly within the territory of one state, the rule is that in such case the boundary is the center of the abandoned bed of the stream, and not the line of steamboat navigation, or the point of deepest water.

Halleck on Int. Law, Sec. 24;

Farnham on Water, Vol. 3, p. 2495;

Woolsey Int. Law, Sec. 58;

Wharton's Digest of Int. Law, Vol. 1, Sec. 30;

Opinions of Attorneys General, Vol. 8, p. 177;

Sandar's Justinian, pp. 168, 169.

Missouri v. Kentucky, 11 Wall. 395;

* *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535;

Nebraska v. Iowa, 143 U. S. 359, 361, 362, 363;

Indiana v. Kentucky, 136 U. S. 47;

Louisiana v. Mississippi, 202 U. S. 1, 49, 51;

Washington v. Oregon, 211 U. S. 134, 135;

Railroad Company v. Clinton, 88 Iowa 188;

Belle Fontaine Improvement Co. v. Neidring-

haus, 181 Ill. 426.

14. Hence, where by an avulsion the main channel changes by cutting off a peninsular from one state and forming into an island, or the channel changes so that an island which was on one side of the main channel of the river is left on the other side, these work no change of boundary or ownership of the island. The dominion and jurisdiction of a state bounded by a river continue as they existed at the time when it was admitted to the Union, unaffected by the action of the forces of nature upon the course of the river, except such changes as may

be made imperceptibly and gradually by accretions and erosions.

Missouri v. Kentucky, 11 Wall. 395;
St. Louis v. Rutz, 138 U. S. 226, 246, 247;
Indiana v. Kentucky, 136 U. S. 479;
Washington v. Oregon, 211 U. S. 127, 134, 135,
 136;
Letters of Mr. Frelinghuysen, Secy. of State, to Mr. Romero, Mexican Minister, in regard to islands in the Rio Grande;
Wharton's Digest of Int. Law, Sec. 30, pp. 85 to 94.
Letters of Mr. Bayard, Secy. of State, to Mr. Bowen, June 12, 1886;
Wharton's Dig. Int. Law, Sec. 30, pp. 94, 95.

15. The rule above announced that the boundary line is the center of the abandoned channel or bed of the river, is further modified by the rule that, as the soil under the Mississippi river east of the western boundary of Tennessee belongs to that state, when as the result of an avulsion the water ceases to flow over it, that which has been lost by submersion as the result of erosion, as well as that which has been gained as the result of accretion, will, when capable of identification, be restored to the original owners. ,

St. Louis v. Rutz, 138 U. S. 226;
Hardin v. Jordan, 140 U. S. 382;
Stockley v. Cissina, 119 Fed. 831;
State v. Muncie Pulp Company, 119 Tenn. 47, 130, 131;
Mulry v. Morton, 100 N. Y. 426; 53 Am. Rep. 215;
Packer v. Bird, 137 U. S. 666;
Hughes v. Birney, 107 La. 664.

16. The rule in Tennessee is that the riparian owner holds to low-water mark, and the title to the bed of the stream remains in the state.

Martin v. Nance, 3 Head 649;
Holbert v. Edens, 5 Lea 204;
Posey v. James, 7 Lea 98;
Goodwin v. Thompson, 15 Lea 209;
Stockley v. Cissna, 119 Fed. 829;
Taylor v. Commonwealth, 102 Va. 759;
Holman v. Hodges, 112 Iowa 714.

17. The rule in Arkansas is that the title of the riparian owner extends only to high-water mark.

Railroad v. Ramsey, 53 Ark. 314; 8 L R. A. 159;
 22 Am. St. Rep. 195.

18. In applying the rule of reliction as between nations, the court will follow, as it does in the case of erosions, accretions and avulsions, the rule as applied to individuals. ,

Rhode Island v. Mass., 12 Pet. 654;
Nebraska v. Iowa, 143 U. S. 361;
Opinions of Attorneys General, Vol. 8, p. 175,
 177;
State v. Pulp Co., 119 Tenn. 47.

19. (a) A river is composed of bed, banks and stream. The bed is a definite and commonly a permanent channel, which consists of the soil which is permanently submerged by the water.

Farnham on Waters and Water Rights, Vol. 2,
 sec. 417, p. 1462;
Eastman v. St. Anthony Falls, 43 Minn. 60; 44
 N. W. 882.

(b) The banks are the elevations of land which confine the waters to their natural channel when they rise to the highest point at which they are still confined to a definite course and channel.

Authorities, *supra*.

(c) The channel is the necessary passageway between the banks through which the waters of the stream flow.

Farnham on Waters and Water Rights, Sec. 417, Vol. 2, p. 1463;

Benjamin v. Manistee River Improvement Company, 42 Mich. 628; 4 N. W. 483.

(d) The word "channel" is defined in the Century Dictionary, Volume 2, Page 921, as follows:

1. The bed of a stream of water; the hollow or course in which a stream flows.

2. The deeper part of a river, or of any estuary, bay, etc., where the current flows, or which is most convenient for the track of a ship.

(e) In Webster's New International Dictionary, Page 369, Column 1:

1. The hollow bed where a large body or stream of water runs or may run.

2. The deeper part of a river, harbor, strait, etc., where the main current flows, or which affords the best and safest passage for vessels.

20. The question of the right of navigation can have no bearing in the decision of the boundary between the States of Arkansas and Tennessee, because the river has

at all times been open to navigation under the acts of Congress.

State v. Pulp Company, 119 Tenn. 47, 94;
The Appolon, 9 Wheat. 365;
Handley v. Anthony, 5 Wheat. 374;
Bedford v. U. S., 192 U. S. 225;
Jackson v. U. S. 230 U. S. 1;
Wharton's Dig. Int. Law, Sec. 30;
Gould on Waters, Sec. 202;
Treaty Between United States and Great Britain, 1783;
Treaty United States with Spain, 1795;
First Statutes, 464, ch. 29; 490, ch. 46;
Second Statutes, 229, ch. 27; 277, ch. 35; 641,
ch. 21; 662, ch. 46; 701, ch. 50; 743, ch. 95;
Third Statutes, 348, ch. 23.

ARGUMENT.

If there is any difference between the descriptions of the western boundary of Tennessee and the eastern boundary of the State of Arkansas, that of the State of Tennessee must control, because Congress has no power to change the boundary line of a state without its consent: *Louisiana v. Mississippi*, 202 U. S. 40; *State v. Muncie Pulp Company*, 119 Tenn. 47, 66, 69. It has, however, been adjudged that the "middle of the main channel of the Mississippi river" and the "middle of the Mississippi river" are synonymous terms. The expression as used in the description of Arkansas' east boundary was evidently intended to make the common boundary more definite by designating the larger channel, where there existed two or more channels on account of the numerous islands to be found in the river. *State v. Muncie Pulp Company*, 119 Tenn. 47, 69.

Although the general rule is that where a river forms the boundary between two states or nations and the original property is in neither, the presumption is that each holds to the middle of the stream (*Handley v. Anthony*, 5 Wheat 374; *Wharton's Dig. Int. Law*, vol. 1, p. 95), but this is a rebuttable presumption, and obtains because the right of navigation is supposed to be common to both countries or states. *Halleck Int. Law*, p. 146; *Wharton's Dig. Int. Law*, Sec. 30, Vol. 1, p. 97; *Washington v. Oregon*, 211 U. S. 134.

So, in the absence of convention or agreement, the boundary is considered the middle of the main channel of the river, or the middle of the river.

Woolsey Int. Law, sec. 58, says:

"When a navigable river forms the boundary between two states, both are presumed to have free use of it, and the dividing line will run in the middle of the channel unless the contrary is shown by long occupancy or agreement of the parties."

Halleck says:

"Where a navigable river forms the boundary of conterminous states, the middle of the channel—the *filum aquae* or *thalweg*—is generally taken as the line of their separation, the presumption of law being that the right of navigation is common to them both. But this presumption may be rebutted or destroyed by actual proof of exclusive title of one of the riparian proprietors to the entire river. (P. 146).

In the opinion of Mr. Attorney General Cushing (8 Opin. of Attorneys General, 174), it is said:

"The most simple of all the original conditions of the inquiry is where the river appertains by convention equally to both countries, their rights being on either side to the *filum aquae*, or middle of the channel of the stream." P. 177.

In Wharton's Elements of International Law, it is said:

"Where a navigable river forms the boundary of conterminous states, the middle of the channel, or the thalweg, is generally taken as the line of separation between the two states, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of the prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river." P. 346, 2d Ann. ed.

It is insisted in the brief of the State of Arkansas that the term "middle of the river" or "midchannel," as thus used refers not to the primary meaning of the word "channel," which is synonymous with the word "bed" (See authorities, brief Section 19), but to the track of steamboat navigation, and varies as it may vary, independent and irrespective of what changes may take place on either bank by accretion or erosion, and whether there be any change in the bank.

This is not the position which is stated in the original bill. Sec. 6, p. 6; Sec. 7, p. 7. At least, the track of steamboat travel is not referred to in the bill, but the boundary line is described as "the middle of the main channel of the Mississippi river."

Before and since the filing of the bill, the State of

Arkansas had uniformly maintained that the middle of the Mississippi river, or the middle of the main channel, means the center of the main bed of the river as construed by the treaty with Spain in 1795, and as now insisted upon by the State of Tennessee. Until the filing of her brief in this cause Arkansas had not, so far as we are advised, taken the position that the middle of the Mississippi river, or the middle of the main channel of the river, meant the middle of the varying line of steamboat travel.

The case of *Iowa v. Illinois*, 147 U. S. 1, is cited as sustaining her present contention. There is no statement made in the case to show whether at the points of inquiry there was more than one channel of the river, but it appears in a subsequent case that at least one of the places then in dispute where the river was crossed by railroad bridges, there was more than one channel, caused by islands in the river. *C. & N. W. Railroad Company v. Clinton*, 88 Iowa 188, 55 N. W. 462. The Court in *Iowa v. Illinois* reviewed the opinions of the Supreme Court of Iowa in the case of *Duluth & Dubuque Bridge Co. v. County of Dubuque*, 55 Iowa 558, and of the Supreme Court of Illinois in the case of *Buttenuth v. St. Louis Bridge Company*, 123 Ill. 535, but did not adopt the conclusion reached in either. In *Bridge Company v. County of Dubuque*, 55 Iowa 558, the Supreme Court of Iowa held that Iowa had the right to tax a bridge across the Mississippi River to the middle of the main arm or body of the stream, and no further, although at the point where such structure is situated the channel or part of the river fol-

lowed by steamboat men in navigating the river was east of such place. The Supreme Court of Illinois in discussing the question, laid emphasis on the right of navigation, saying:—

“When a river navigable in fact, is taken or agreed upon as the boundary between two nations or states, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either state intended to surrender to the state or nation occupying the opposite shore the whole of the principal channel or highway for vessels and thus debar its own vessels the right of passing to and fro for purposes of defense or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purposes of commerce or other purposes deemed of great value, to independent states or nations.” (147 U. S. 13).

The conclusion announced was that the center of the line of steamboat travel was the boundary line.

This Court, speaking through Mr. Justice Fields, after considering the two opinions, said:

“The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring states, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each state equality in right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the ‘midchannel,’ ”

and, if there be several channels, *to the middle of the principal one*, or, rather, the one usually followed."

"It is therefore ordered, adjudged and decreed that the boundary line between the State of Iowa and the State of Illinois *is the middle of the main navigable channel of the Mississippi River.*" (147 U. S. 13). (Italics are ours.)

Applying the above definitions to the *locus in quo*, it will be observed by a reference to the Humphrey's map (exhibit A to Answer) that at the time of the admission of Arkansas into the Union, there was a small channel between Dean's Island and the State of Arkansas. Likewise, there was a small channel between Island No. 36 and the Tennessee shore. There was a channel around Island No. 37, and between it and the main Arkansas shore, and likewise a channel between Island No. 37 and the Tennessee shore, shown on this map as McKenzie's chute. Therefore, the channel, the middle of which was the boundary line between the two states, was the main channel flowing between Island No. 36 and Dean's Island on the Arkansas shore, and flowing around and to the north of Island No. 37, which was then and at all times since has been in the jurisdiction of the State of Tennessee. It was not, and could not have been, the meaning of the court in the case of *Iowa v. Illinois* to adjudge that the boundary line between the states shifted with the varying line of steamboat travel at different stages of water, as that line might be changed by the shifting in the bottom of the river, or the presence of snags, logs, sand, or other impediments to navigation.

We do not understand that in the case of *Iowa v. Illinois*, this Court did more than to decide that the boundary line between states, in the absence of convention or agreement, in a navigable river is the middle of the main or navigable channel of that river. The opinion shows that this Court, while approving what was said by the Illinois Court as to the right of navigation, was careful not to adopt either the theory as maintained in the 55th Iowa case, or in the 123rd Illinois case. And such seems to be the construction placed by this Court on that opinion, for in *Louisiana v. Mississippi*, 202 U. S. 1, 49, it defined the term "thalweg":

"The term 'thalweg' is commonly used by writers on international law in definition of water boundaries between states, meaning the middle or deepest or most navigable channel."

and construing the opinion in *Iowa v. Illinois*, said:

"In *Iowa v. Illinois*, 147 U. S. 1, the rule of the thalweg was stated and applied. The controversy between the States of Iowa and Illinois on the Mississippi River, which flowed between them, was as to the line which separated 'the jurisdiction of the two states for the purposes of taxation and other purposes of government.' Iowa contended that the boundary line was the middle of the main body of the river, without regard to the 'steamboat channel' or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This Court held that the *true line in a navigable river between States is the middle of the main channel of the river.*" p. 49.

Italics are ours.

In the last cited case what is said as to fixing the boundary line in Detroit River confirms our construction of the case of *Iowa v. Illinois*, that is, where there is more than one channel or stream, the deep water or navigable channel is the one meant. For at page 51 (202 U. S.), this Court says:

"In the San Juan Water Boundary controversy between the United States and Great Britain, Emperor William I. gave the award in favor of the United States, October 21, 1871, by deciding 'that the boundary line between the territory of Her Britannic Majesty and the United States should be drawn through the Haro Channel'; and it is apparent that the decision was based on the deep channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed, in a subsequent definition of the boundary, signed by the Secretary of State, the British Minister and the British representative, the boundary line was said to be prolonged until 'it reaches the center of the fairway of the Straits of San Juan de Fuca.' The fairway was the equivalent of the thalweg.

"Again, in fixing the boundary line of the Detroit river, under the sixth and seventh articles of the Treaty of Ghent, the deep-water channel was adopted, giving Belle Isle to the United States as lying north of that channel.

"So, in the Alaskan Boundary case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England; Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland Channel was the proper boundary line, and included Wales Island, to the north of which the channel passed. This sustained the American contention in regard to the thalweg and the island lying south of it." P. 51.

Neither in the San Juan water boundary controversy, nor in fixing the boundary line in Detroit river, nor in the Alaskan boundary case, as construed by this court, was anything done except to define the deep water or the main channel, where there were several channels.

However, in the above, the controversies were between different nations, where the right of navigation was to be guarded. That is not true, so far as the Mississippi river is concerned. See Brief, sec. 20. The right of navigation in that river is secured by acts of Congress, and no conflict of jurisdiction, so far as the right of navigation is concerned, could arise.

In the case of *Washington v. Oregon*, 211 U. S. 127 the Court in discussing the principle announced in *Iowa v. Illinois*, said:

"But in these cases the boundary named was 'the middle of the main channel of the river,' or 'the middle of the river,' and it was upon such a description that it was held that in the absence of avulsion the boundary was the *varying center* of the channel. But there is no fixed rule making that the boundary between States bordering on a river." p. 134.

"Now, if Congress in establishing the boundary between Washington and Oregon had simply named the middle of the river, or the center of the channel, doubtless it would be ruled that the *center of the main channel*, varying as it might from year to year through the *processes of accretion*, was the boundary between the two states." Pp. 134, 135.

Italics are ours.

In other words, the center of the main channel as it

may vary from year to year through processes of accretion and erosion is the true boundary between states separated by a navigable river. The steamboat channel may vary from other causes than erosion or accretion. The stages of water, a snag in the river, or a sand bar formed on the bottom may change it, and yet make no change in the banks. The cases are careful to say that this center line of the main channel remains the boundary, subject to be changed by accretion and erosion on the opposite banks, *but they are careful to say that the change must be so produced.*

And this construction of the opinion of *Iowa v. Illinois* is further emphasized in the same case on rehearing, 214 U. S. 205, where the Court considered the meaning of the act admitting Oregon, and that part of it which defined its northern boundary line, as follows:

"Thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof to a point near Fort Walla Walla." P. 215.

The Court said:

"We agree with counsel that the term 'widest channel' does not mean the broadest expanse of water. There must be in the first instance a channel—that is, a flow of water deep enough to be used, and in fact used by vessels in passing up and down the river; but it does not mean the deepest channel, but simply the widest expanse of water which can reasonably be called a channel. Now, close to Snag Island there appear several channels, the principal

ones being Woody Island channel and Cordell channel, both used at different times by vessels navigating the river. The Cordell channel runs to the north of Snag Island, the Woody channel to the south, while the boundary claimed by the State of Oregon runs in a channel far to the north of both Woody Island and Cordell channels." p. 216.

The opinion in *Iowa v. Illinois* was construed by the Supreme Court of Iowa in the case of *Railroad Company v. Clinton*, 88 Iowa 188, 55 N. W. 462. In that case a bridge was constructed by the Chicago & Northwestern Railroad across the Mississippi River opposite to the town of Clinton. It was constructed across a channel of the river to Little Rock Island, and across the island to another channel, and across that to the main land in the State of Illinois. Little Rock Island is a permanent island, well defined, and contains about forty acres. The proof showed that the channel on the west side of the island was the main channel. The question before the Court was, at what point in the Mississippi River does the bridge cross the middle of the main channel of the said river? Is the middle of said river the middle of the channel between the Iowa shore and the western bank of Little Rock Island, or is the middle of the channel between the main shores. The Court referring to the respective views of the Supreme Courts of Iowa and Illinois as expressed in 55 Iowa 558, and 123 Illinois 535, said:

"By reason of this conflict of views an action was brought by the State of Iowa against the State of

Illinois to determine the boundary line between the two States along the course of the Mississippi River. That case has recently been determined by the Supreme Court of the United States, and it is held by that Court that the boundary line is the middle of the main navigable channel, or channel most used, and not the middle of the *great bed of the stream*, as defined by the banks of the river. See *State of Iowa v. State of Illinois*, 13 Sup. Ct. Rep. 239. This determination of the question is authoritative, and must be followed, and the result is that the middle bank of Little Rock Island is the true boundary line for the purposes of taxation and other governmental purposes." p. 462.

In the case of *Belle Fontaine Improvement Company v. Nedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, the Supreme Court of Illinois, as we understand the opinion, took the same position. In determining there the question of the boundary between the states of Illinois and Missouri, it appeared that Willow Bar Island was at that time separated by the main deep water channel from the Missouri shore, while only a shallow branch of water separated it from the Illinois shore. (p. 436.) Quoting from the case of *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, the Court said:

"Where a river is the boundary between the states, as is the Mississippi between Illinois and Missouri, it is the main—the permanent—river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at other times." P. 438.

The Court therefore concluded as follows:

"We hold, therefore, the boundary line between

the states of Illinois and Missouri, as well as the boundaries of Illinois proprietors, is the present center thread of the stream between Willow Bar Island and the Missouri bank." p. 439.

The fact that the thread or center of the stream remains the boundary, regardless of changes by accretion or erosion of the banks, is based upon the fact that the law presumes that the river does not change (*Farnham on Water and Water Rights*, Vol. 3, Sec. 848, p. 2495), but the rule is that where changes happen

"to either bank of the river by accretion on the one or degradation of the other, that is, by the gradual, and as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive movements of its progression." *Opin. of Attys. Gen.*, Vol. 8, p. 177.

Or, as stated in *Nebraska v. Iowa*, 143 U. S. 367:

"The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between the states the varying center of the channel."

Or, as stated by *Halleck on Int. Law*, sec. 24, p. 138:

"Thus, where, by a gradual and insensible movement, the water advances on one side and recedes on the other, or by detrition on one side and deposit on the other a portion of the soil is gradually transferred, there is evidently a loss to one state and an increase to the other. So, also, where islands are washed away on one side of the channel, and new ones formed on the other, there is a corresponding change of territory."

We therefore insist that the meaning of the court in *Iowa v. Illinois* is not that the track of steamboat travel, known only to the experienced river pilot, and frequently to be discovered by repeated soundings, at different places at the varying stages of the river, with the current when descending, and hugging the shores when ascending, is the boundary, but that the center of the main or navigable channel, changing as it may by accretion or erosion.

**BOUNDARY BETWEEN ARKANSAS AND TENNESSEE
SEE FIXED BY CONVENTION, AGREEMENT,
JUDICIAL INTERPRETATION AND
ACQUIESCEANCE.**

However, in the instant case, we insist that whatever may have been the holding of this court in the case of *Iowa v. Illinois*, it is not to govern and will not govern here.

The western boundary of the State of Tennessee is the same as the western boundary of the colonies in 1763,

when by the treaty between Great Britain, Spain and France, it was defined to be

“a line drawn along the middle of the river Mississippi.”

Prior to the treaty of 1795 between United States and Spain, that line, as well as other boundaries between the territory of the United States and Spain, had been a matter of controversy, and by the treaty between the two countries in 1795 it was agreed that this boundary was

“in the middle of the channel or bed of the Mississippi river,”

thus giving to the word “channel of the river” the construction which is contended for by the State of Tennessee in this case—that is the “bed” of the river and not the channel, as used in boatman’s parlance—the ever-shifting and changing line of steamboat travel, which cannot be discerned other than by an experienced pilot.

The boundary line as thus agreed upon between the United States and Spain in 1795 has for years been the accepted boundary line between the States of Arkansas and Tennessee, and the State of Arkansas has exercised jurisdiction in accordance with this agreement as to the boundary line as set forth in the treaty between the United States and Spain. *Cessill v. State of Arkansas*, 40 Ark. 501; *Wolfe v. State*, 104 Ark. 140.

In the above case of *Cessill v. State*, decided in 1883, one Cessill was convicted in the Mississippi County Circuit Court of selling liquors without license.

The sales were made on a boat permanently anchored in the Mississippi river off the Arkansas shore opposite Mississippi County. The defendant insisted that the spot was not in the State of Arkansas as the then present "main channel" of the river did not run as it did on the 30th of October, 1874, when the boundary of the State of Arkansas was last defined. The word "channel" was treated as meaning the best navigable track of boats. The court stated that there was evidence tending to show that the position of the boat was eastward of the channel for boats in 1874. It was confessedly westward of the present channel, and about midway of the principal banks of the river, which are not shown to have changed; but much nearer a bar on the Arkansas side than from the water's edge in Tennessee. The court referred to the fact that there was considerable evidence directed to the location of the navigable low-water channel. The Mississippi Circuit Court instructed the jury that if the liquor was sold at a point opposite Mississippi County between the mainland and the then main channel of the river, that the jurisdiction of Arkansas attached. The court refused to instruct the jury that if they should find the spot to be east of what was the main channel on the 30th of October, 1874, the date of the adoption of the Constitution of Arkansas, they should find for the defendant. The court, speaking through Judge Eakin, said:

"It will be observed that the principle upon which the court proceeded is that the line of deepest water in the river bed is the boundary of the state, and continues such as it fluctuates." p. 593.

The court, referring to the boundary of Arkansas as defined by the act of Congress admitting that state to the Union, approved June 16, 1836, whereby it was designated as "the middle of the main channel of the Mississippi river," said that the question for determination was what is meant by the main channel, and what is the middle of it. He said:

"The channel of a river, bay or sound, is, in boatman's parlance, the course over its bed along which the water is deepest, and the navigation safest. This may be irrespective of the current, or distance from the shore. In questions of geography or boundaries, however, it is more generally used to designate the depression of a bed below permanent banks, forming a conduit along which waters flow, and which may be at sometimes full, and at others nearly if not quite dry. In this sense it is of common use in law. It is the more obvious signification in connection with boundaries, inasmuch as it presents something of a permanent nature, or at least at all times visible; and when changed leaving traces of the old landmarks. In this sense we speak of bayous—Bartholomew and Atchafalaya—as old channels of the Arkansas and Red rivers. They have permanent features independent of water; whereas channels, in the sense of the river pilot, are ever shifting, invisible—discoverable only by patient soundings, and then imperfectly. We cannot suppose that such channels would be adopted as state boundaries, or as references to determine them."

The court declined to accept the channel of a river as defined in the boatman's parlance to be the meaning of the Act of Congress. Continuing as to the object of the

description in using the words "main channel," the court said:

"The Mississippi river is full of islands—having water beds on each side. The object of the description of the boundary was to afford the means of determining whether or not any given island was within the state, by taking the largest of these water conduits as the true river. The middle of the main channel, then, must mean the point or line along the river bed equidistant from the permanent and defined banks of the ascertained channel on either side. Even this line is a fluctuating one, but in a far less and no very inconvenient degree." p. 594.

The court continuing, referred to the treaty between the United States and Spain of October, 1795, and adopted the construction there given, saying:

"The boundary line in question is a very old one, and does not concern this state alone. It originated with the treaty between England, France and Spain, in February, 1763, which made the middle of the Mississippi river the boundary between the British and French territories. This line has been ever since observed in subsequent treaties, in federal legislation, in state Constitutions and judicial decisions, and there are not lacking unmistakable indications of the meaning of the middle of the river. For instance, in the treaty between the United States and Spain, in October, 1795, before our purchase of Louisiana, the fourth article provides 'that the western boundary of the United States, which separates them from the Spanish colony of Louisiana, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of said states to the completion of the 31st degree of latitude north of the equator.'"

"It seems that where there are several channels, the principal one is considered the river, and in this the medium filum makes the boundary."

"There was only one channel in this case, which was the river bed between the Arkansas and Tennessee shores at Osceola. The court and attorneys treated the case throughout as if channel meant the line of deepest water sought by boatmen, and the instructions were given on one side and refused on the other with reference to this idea. The river bed being the same as in 1874, no question could arise as to change of channel. The instructions asked by the defense were erroneous, but those given for the state were equally so, being based on a false theory as to the meaning of channel. It should have been left to the jury to determine whether the position of the boat was nearer to the Arkansas or the Tennessee main bank, and to have found the defendant guilty or innocent accordingly." Pp. 506, 507.

Thus, more than thirty years ago, the Supreme Court of Arkansas declared that its jurisdiction extended to the line along the river bed equidistant from the permanent and defined banks of the ascertained channel on either side, and since that time she has, with the exception of the contention made in this case, which, as appears from the original bill and answer, grows out of a claim of a citizen of Arkansas to so-called accretions to Dean's Island, consistently maintained that position.

In the case of *Wolfe v. State*, 104 Ark. 140, the learned then Attorney-General of Arkansas, Hon. Hal. L. Norwood (who as Attorney-General filed the bill in this cause), in the brief filed in behalf of the State, took the

position as announced in the case of *Cessill v. State*, 40 Ark. 501, which is the position of Tennessee in this case. We quote from his brief as reproduced in 104 Ark., at p. 141:

"The boundary line is a point equidistant from the principal or well-defined banks of the river. 10 Heisk. (Tenn.), 283; 119 Tenn., 47; 79 N. W., 449; 138 U. S., 226; 143 Id., 359; 196 Id., 230; 5 Wheat., 375; 133 Ill., 535; 40 Ark., 501; 53 Id., 314; 24 How., 41; 1 La. Ann., 372; 3 Sm. & M. (Miss.), 366; 55 Ia., 558; 119 Fed., 812."

It will be observed that in that case the State of Arkansas insisted that its jurisdiction extended to a point equidistant from the principal or well-defined banks of the river, and cited the Tennessee cases of *Moss v. Gibbs*, 10 Heisk. 283; and *State v. Muncie Pulp Company*, 119 Tenn. 47; also *Cessill v. State*, 40 Ark. 501; 1 La. Ann. 372; 3 Sm. & M. 366, and *Stockley v. Cissna*, 119 Fed. 812, to sustain the jurisdiction of that state.

In the above case of *Wolfe v. State*, the contention of defendant on appeal was that the state failed to prove the venue of the offense and that the court erred in rulings which it made upon the instructions relative to that issue (104 Ark., 142). He requested the court to instruct the jury that the eastern boundary line of the State of Arkansas opposite Osceola "is the middle of the main channel of the Mississippi river as it was located at the time of the adoption of the constitutions of 1874, 1836 and 1868."

Upon the part of the state the court instructed the jury

that the boundary line between the States of Arkansas and Tennessee is the equidistant point or middle line between the well-defined and ascertained banks of the Mississippi river on the Arkansas and Tennessee shores and that in determining the location of these banks they should take into consideration the erosion or accretion either of said banks as the same added to or took away from them. The court further charged the jury that the state must show

"by a preponderance of the evidence that the alleged sale was made on the west side of the middle line between the well-defined and ascertained banks of Arkansas and Tennessee in the Mississippi river." P. 143. This shows the exercise of jurisdiction by the courts of record of Arkansas to the middle of the river, as Tennessee insists in this case.

The Supreme Court said:

"The location of the eastern boundary line of the state of Arkansas and of Mississippi County was discussed and determined by this Court in the opinion rendered by Mr. Justice Eakin in the case of *Cessill v. State*, 40 Ark. 501." (P. 143.)

The court held that it was not necessary for a proper determination of the case to pass upon the correctness of the instructions requested by the defendant, or those given by the court, because, it said, if the instructions requested by the defendant are correct, it was of the opinion that the sale was made at a point west of that line, and therefore in Mississippi County. For, said the court,

"There was only one witness who testified in this case, and the evidence which he gave shows that at the time the sale was made the boat was on the river in the channel between the island on the east thereof and the Arkansas shore on the west. On the west side of this island there was a sand bar making a well-defined bank; and the river flowing between this bank and the Arkansas shore was the channel of navigation and commerce at the time the sale was made. This channel of the river was several hundred yards in width. From this island eastward, and towards the principal bank of the Tennessee shore, the river was so low that it did not cover the sand or land, on that side to the Tennessee shore, which was more than a mile from the island. The witness, however, also testified that the waters of the river did run at high stage between the island and the Tennessee shore, and probably did so at the time of the sale. The witness testified that at the time of the sale the boat had not gone as far as the middle line between the west bank of the island and the Arkansas shore, and was nearer to the Arkansas shore than to the bank of the island." p. 144.

In other words, the theory of the defendant seemed to be that where there were two channels of the river, it was the middle of the main channel, which is not controverted by the State of Tennessee in this case. The position of the learned Attorney General is thus stated by the court in that opinion:

"It will be observed that the instructions given by the court defined the eastern boundary of the state as the middle line between the well-defined and ascertained banks of the Mississippi river on the Arkansas and Tennessee shores, and that the instructions requested by the defendant defined this line to

be the middle of the main channel of the Mississippi river. It is argued by counsel for the state that the main channel of the Mississippi river has no reference to the channel of navigation or commerce, but that the middle of the main channel of said river is the middle line in the bed in which the main stream of the river flows between the principal banks of the Arkansas and Tennessee shores, and that, according to the uncontested testimony, the sale was made at a point far to the west of that line. He further argues that, by the instructions requested by the defendant, the defendant incorrectly claims that the main channel of the Mississippi river is the channel of commerce and navigation." pp. 144, 145.

The court held that it made no difference whether the court in determining the boundary, took the entire breadth of the river, not counting the island, or whether it took the main channel of the river west of the island, because, as it said:

"If it should be considered that this channel between said island and the Arkansas shore is the main channel of the Mississippi river, and the middle line of that channel is the state's eastern boundary, then the uncontested testimony shows that the sale of the liquor was made west of that line and nearer the Arkansas shore." p. 145.

However, as will appear from said opinion, neither the state nor the defendant, nor the court, at any time considered the line of steamboat travel to be the boundary line between the states.

This construction of the boundary line has been approved by the Supreme Court of Tennessee in the cases of *Moss v. Gibbs*, 10 Heisk. 283; *Foppiano v. Speed*, 113

Tenn. 167, 173; *State v. Muncie Pulp Company*, 119 Tenn. 47, 78; *Stockley v. Cissna*, 119 Tenn. 135.

In *State v. Pulp Company, supra*, the Supreme Court said:

"The general understanding of the people and the constituted authorities of Tennessee has been and is that the line separating the State of Arkansas is as defined in the case of *Cessill v. State, supra*. This appears from an act of the General Assembly of the State, approved April 15, 1903 (chapter 420, p. 1215, Act 1903), in which the lands in controversy and all others lying upon the Tennessee side of the middle of the old bed of the river are declared to be the property of the state and the governor authorized to appoint commissioners to act with other commissioners to be appointed by the State of Arkansas to run and mark the line, and also to report to the governor the extent and value of such lands. The General Assembly of Arkansas passed a similar act, but it was vetoed by the governor of that state, and therefore no commissioners were appointed under the act passed by the legislature of Tennessee. This suit was brought by direction of the governor of this state, and is not only an acquiescence in the boundary line as defined by the authorities of Arkansas, but an assertion of jurisdiction up to that line and title to property within it. We think, whatever may be the construction of the treaties defining this great boundary line, or the acts of Congress admitting other states bordering upon it, that the concurrence of Tennessee and Arkansas in the interpretation of the treaties and legislation affecting their boundary line is effective between them, and controlling in this and other cases involving the question." pp. 78, 79.

In the case of *Foppiano v. Speed*, 113 Tenn. 167, 173, the Supreme Court of Tennessee, speaking through Mr.

Justice (now Chief Justice) Neil, held in a case similar to that of *Cassill v. State*, 40 Ark. 501, that the center of the Mississippi river is the dividing line between Tennessee and Arkansas, and that for sales of liquor made on a boat west of that line the plaintiff in error, Foppiano, was liable for privilege taxes imposed by the State of Tennessee. The court did not consider the track of steamboats between the two states as at all determinative. Judge Neil said.

"The center of the Mississippi river is the line between Tennessee and Arkansas (*Moss. v. Gibbs*, 10 Heisk. 283; *Stockley v. Cissna*, 119 Fed. 821, 56 C. C. A. 324; *Missouri v. Kentucky*, 11 Wall. 395, 20 L. Ed. 116), and we are of the opinion that for exercising the privilege referred to within the limit just stated plaintiff became liable for the tax." (p. 173).

The same conclusion was announced in the case of *Stockley v. Cissna*, 119 Fed. 812, 821, as follows:

"When the territory now constituting the State of Tennessee was ceded by the State of North Carolina to the United States, the center of the main channel of the Mississippi river was the boundary separating North Carolina from the Spanish territory west of that river."

In the case of *Myers v. Perry*, 1 La. Ann. 372, a collision between steamboats in the river was presented and it became necessary to ascertain whether the same was in the jurisdiction of Louisiana or Mississippi. In that case the middle of the Mississippi river was adopted as

the true boundary line, without reference to the deepest water, or the line of steamboat navigation.

Also, in the case of *Morgan & Harrison v. Reading*, 3 Sm. & Mar. 366, the Supreme Court of Mississippi referred to the western boundary of Mississippi as a line drawn along the middle of the Mississippi. As was said by the Supreme Court of Arkansas in the case of *Cessill v. State*, 40 Ark. 506, when commenting upon this line:

"This would not be a good description of a steam-boat track, zigzagging from bank to bank amongst sand bars in low water." p. 506.

The case of *St. Louis v. Rutz*, 138 U. S. 226, supports our contention. That was a case brought to recover an island in the Mississippi river and involved the location of the lines separating the States of Missouri and Illinois. The court said: (p. 242.)

"The Supreme Court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi river extends to the middle of the main channel of that river. *Middleton v. Pritchard*, 3 Scammon, 510; *Braxon v. Bressler*, 64 Ill. 488; *Houck v. Yates*, 82 Ill. 179; *Cobb v. La-valle*, 89 Ill. 331; *Lavalle v. Strobel*, 89 Ill. 370; *Washington Ice Company v Shortall*, 101 Ill. 46; *Village of Brooklyn v. Smith*, 104 Ill. 429, 438; *Trustees of Schools v. Schroll*, 120 Ill. 509, 518, 519; *Butenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 550."

In discussing the location of the island in controversy, after saying that the middle of the main channel of the Mississippi river and the middle of the Mississippi river were synonymous, the court said:

"It follows that an island in the Mississippi river, in its course between Illinois and Missouri, must lie wholly in one of those states or the other, because wholly in one of those states or the other, *because the main channel of the river must run on one side or the other of such island.*" P. 249.

And, again,

"As the law of Illinois confers upon the owner of land in that state which is bounded by, or fronts on, the Mississippi river, the title in fee to the bed of the river to *the middle thereof*, or so far as the boundary of the state extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of *the middle of its width*. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the State of Missouri, to extend his ownership, by mere occupation, to land situated in the State of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that state." P. 250. (Italics are ours.)

Thus, the main channel of the Mississippi river has been construed to mean where there is more than one channel, the principal one. It was so applied by this Court in the case of *Missouri v. Kentucky*, 11 Wall. 395, where the boundary line between Missouri and Kentucky was in dispute. Wolf Island was shown to have been on the west side of the main channel of the river at the date of the admission of Kentucky into the Union. The Court held that the fact the steamboat had changed, Kentucky's title would not be affected thereby. The Court, in speaking of the dividing line, said:

"It is unnecessary for the purpose of this suit to consider whether, on general principles, the middle of the channel of a navigable river which divides co-terminus states, is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain and England, in February, 1763, stipulated that the middle of the river Mississippi should be the boundary between the British and the French territories on the continent of North America. And this line, established by the only sovereign powers at the time interested in the subject, has remained ever since as they settled it. It was recognized by the treaty of peace with Great Britain of 1783, and by different treaties since then, the last of which resulted in the acquisition of the territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into the Union as a state in 1820, were fixed on this basis, as were those of Arkansas in 1836. And Kentucky succeeded, in 1792, to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the *middle of the bed of the Mississippi river.* It follows, therefore, that if Wolf Island, in 1763, or 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the states and the island does not, in consequence of this section of the water, change its owner." P. 401. (Italics are ours.)

COURT CONSIDERED QUESTIONS OF INTERNATIONAL LAW IN IOWA V. ILLINOIS, 147 U. S. 1.

The case of *Iowa v. Illinois*, 147 U. S. 1, was deter-

mined upon principles of international law. The question which seemed to be controlling in the decision of the above case was that the right of navigation of both states should be preserved. In that case, Mr. Justice Field said:

"We are of the opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river."

It was not called to the attention of the Court in that case, nor did the Court consider, that free navigation of the Mississippi river by citizens of the United States was expressly provided for and preserved by the treaties made by the United States with Great Britain in 1783, and that made by the United States with Spain in 1795, above referred to. That, at least, cannot be an important or controlling question in this case, for the right of citizens of the several States of the Union to navigate the waters of the Mississippi river has been frequently declared, and is so well established that, to use the language of the Supreme Court of Tennessee in *State v. Muncie Pulp Company*, 119 Tenn. 94,

"no possible apprehension can be entertained that it will be interfered with." P. 94.

This right was early declared in the case of *Morgan, etc., v. Reading*, 3 Sm. & Mar. (Miss.) 366, where it was said that the various treaties and acts of Congress declaring the Mississippi river to be a common highway, and forever free to the citizens of the United States, without any tax, duty, etc., gave a right to an easement in the

river, but permitted states to control and own banks and wharves. In the concluding opinion, delivered by Mr. Justice Clayton, in that case, it was said:

"The free navigation of that river has been guaranteed in several different modes referred to in the opinion in chief. This unquestionable right carries with it all the means necessary for the accomplishment of the end. 1 Kent, 35. I should be unwilling, therefore, in this case, to say anything which could give countenance to the idea that the right to land and moor vessels to the shore for purposes necessary to navigation could be questioned or embarrassed by the owners of the bank. Probably there is but little cause for fear on this head, but it is not improper to guard against a possible contingency. The right to charge for the use of wharves, erected for the convenience of commerce and the benefit of navigation, depends on a different principle, and those who use them may be justly considered to have consented to pay for the increased facilities they afford." Pp. 407, 408.

The right of the general Government to protect and promote the navigation of the Mississippi river extends to the revetment of the banks to prevent erosion from natural causes, and the construction of levees to prevent the overflow of the river at its flood stage. *Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24.

In the above cases it was announced that the United States has plenary power to legislate for the benefit of navigation, and is not liable for remote or consequential damages caused by works constructed to that end through the agency of the Mississippi River Commission.

In the *Minnesota Rate Case*, 230 U. S. 352, 403, Mr. Justice Hughes, speaking for this Court, said:

"And while Congress has full power over the subject and to a certain extent has prescribed rules, it is still in a large measure subject to the regulation of the States. *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187.

A state is entitled to protect its coasts, to improve its harbors, bays and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is a conflict with some act of Congress.

* * * But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the Federal authority in its dormant state."

If there was ever any doubt as to the scope of the power of the Federal Government over the navigation of the Mississippi river, it is put at rest by the cases above cited.

We therefore insist that, even though we have not correctly interpreted the principle announced by Mr. Justice Fields in *Iowa v. Illinois*, 147 U. S. 1, or should this court feel bound to hold to the rule there announced, as it is interpreted by Arkansas in the brief filed in her behalf, under the doctrine of *stare decisis*, nevertheless, in the instant case the boundary line between Tennessee and Arkansas will be determined in accordance with the uniform construction of that line by the two states, and because it has been settled by convention, decision, legislation, acquiescence and other acts.

BOUNDARY SETTLED BY PRESCRIPTION.

It appears that the State of Arkansas has uniformly exercised jurisdiction over that portion of the Mississippi river lying west of the line as above defined, and which is the same line as defined by the treaty between the United States and Spain of 1795.

The rule is well settled that, where a state has for many years exercised undisturbed jurisdiction over a particular territory, a prescriptive right arises which is equally binding under the principles of justice on states as well as individuals. *Rhode Island v. Massachusetts*, 4 Howard 591, 639; *Virginia v. Tennessee*, 148 U. S. 503, 522, 523; *Indiana v. Kentucky*, 136 U. S. 479, 510; *Louisiana v. Mississippi*, 202 U. S. 153; *Maryland v. West Virginia*, 217 U. S. 141, 144; *Same Case*, 217 U. S. 577.

In the case of *Rhode Island v. Massachusetts*, 4 Howard, 639, the Court said:

“Surely, this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.”

In *Indiana v. Kentucky*, 136 U. S., at page 510, the Court said:

"It is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

In *Virginia v. Tennessee*, 148 U. S., at page 523, the Court, speaking through Mr. Justice Field, said:

"Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary."

In *Louisiana v. Mississippi*, 202 U. S., at page 53, the Court said:

"The question is one of boundary, and this Court has many times held that, as between the states of the union, long acquiescence in the assertion of a particular boundary and the exercise of sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

In *Maryland v. West Virginia*, in applying the principle announced in the above cases, the Court, speaking through Mr. Justice Day, said:

"A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored."

After citing and quoting from authorities, he concluded:

"The effect to be given to such facts as long continued possession 'gradually ripening into that order,' depends upon the merit of individual cases as they arise. 1 *Oppenheim International Law*, 243. In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon states and individuals. *Rhode Island v. Massachusetts*, 12 Pet. 657."

In *Louisiana v. Mississippi*, 202 U. S. 1, 53, on the question of contemporaneous construction and acquiescence, the Court said:

"The question is one of boundary, and this Court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. *Virginia v. Tennessee*, 148 U. S. 503; *Indiana v. Kentucky*, 11 Wall. 395; *Rhode Island v. Massachusetts*, 4 How. 591."

In *Missouri v. Kansas*, 213 U. S. 78, 85, the contem-

poraneous and long-continued construction by the states of Missouri and Kansas that the middle channel of the Missouri river formed the boundary line between the states, was referred to by Mr. Justice Holmes, who said:

"That this was understood by Missouri to be the effect of the act is shown by a succession of statutes declaring the boundaries of the river counties in this part. They all adopted the middle of the main channel of the river; beginning with the act that organized the County of Platte, approved December 31, 1838, Mo. Laws, 1838, pp. 23-25, and going on through the Revised Statutes of 1855, p. 459, Sec. 12 (Clay), p. 466; Sec. 33 (Platte), p. 478; Sec. 65 (Jackson), etc., to 2 Revised Statutes, 1879, Ch. 94, Secs. *Golden*, 52 Mo. App. 229, and *St. Louis & G. I. R.* poraneous and long continued and we regard it as clear. It is confirmed by the cases of *Cooley v. Golden* 52 Mo. App. 229, and *St. Joseph & G. I. R. Co. v. Devereux*, 41 Fed. Rep. 14, both of which cases notice that the act extended the boundary to the river, and not merely to the bank" (P. 85.)

Applying the principle of these cases to the case at bar, by reason of the long-continued acquiescence, at first between the nations between whose territories the river was the boundary, as construed and interpreted in the Treaty of 1795 between Spain and United States, and subsequently as construed and applied by the states of Tennessee and Arkansas, "the line so established takes effect . . . as a definition of the true and ancient boundary;" and that boundary is the middle of the main channel, or bed, of the river, equidistant between the well-defined banks, between which the waters flow at their usual and ordinary stages. It will not do for the state

of Arkansas to maintain at the Bar of this Court a position contrary to that by which its jurisdiction was established by the highest tribunal of that state in the case of *Cessill v. State*, 40 Ark. 501, and as the learned attorney general maintained in her behalf in the case of *Wolfe v. State*, 104 Ark. 140, and as the jurisdiction of that state has uniformly been asserted and maintained.

Whatever, therefore, might be said as to the true meaning of the words, "the middle of the channel of the Mississippi river," or "the middle of the Mississippi river," it is unnecessary to decide in this case, because the sovereign states have long acquiesced in a boundary line which is equidistant between the well-established banks.

WHERE THE RIVER ABANDONS ITS CHANNEL
THE RULE IS THAT THE BOUNDARY LINE BE-
TWEEN THE STATES OR NATIONS IS THE
MIDDLE OF THE ABANDONED CHAN-
NEL OR BED.

As we have already observed, wherever the rule has been applied, that the middle of the channel of navigation is the boundary line between states separated by a navigable river, it has been done upon the principle that the controlling consideration "is that it preserves to each side equality to the right of navigation in the river." (147 U. S., page 13.)

When a river deserts its old bed or channel and makes for itself a new channel, there is no such controlling consideration, and the rule, so far as we know, is, without

exception, that the middle of the deserted bed or channel is the boundary line.

When the opinion of Attorney General Cushing was asked as to the boundary line between the Mexican Republic and the United States, where it was formed by the Rio Bravo, in speaking as to what would then be the true boundary, in the contingency which might happen should that river desert its original channel and force for itself a new channel in another direction, he said:

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory it thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains *in the middle of the deserted river bed*. For, in truth, just as a stone pillar constitutes a boundary, not because it is stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel and within given banks which are the real international boundary."

8 Opinions of Attorneys General, pp. 177, 178.

In the same opinion, quoting from Almeda, he says:

"As the river belongs to two nations, so also, the river bed, if by chance it becomes dry, is divided between them as proprietors." (P. 179.) (Italics are ours.)

This opinion was quoted with approval in the case of *Nebraska v. Iowa*, 143 U. S. 359. In that case the Court, quoting from Vattel, said:

"But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course, and runs into one of the two neighboring states, the bed which it has abandoned becomes thenceforward their boundary, and remains the property of the former owner of the river." (Pp. 366, 367.)

Applying the authorities reviewed, Mr. Justice Brewer declared that the result of the authorities put it

"beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and that avulsion would establish a fixed boundary, to-wit: *the center of the abandoned channel.*" (P. 367.) (Italics are ours.)

And, again, at page 370, he says:

"By this selection of a new channel, the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel."

The case of *Buttenuth v. St. Louis Brick Company*, 123 Ill. 535, where it was held that the middle of the main channel of the river meant the center of the channel of navigation as understood in boatmen's parlance, nevertheless recognized the principle governing the case of avulsion, and that the rule no longer applied where the old bed was abandoned, and it must also have had in con-

sideration the impossibility of locating in after years the exact line of navigation, for it was there said:

“But, if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed.”

5 Am. St. Rep., p. 552.

In *Wharton's Digest of International Law*, Vol. 1, Sec. 30, p. 96, it is said:

“Where a river is the boundary between two nations, it continues so notwithstanding accretion and decreetion of its banks; but, if it violently leaves its bed, the latter remains the boundary.”

In *Halleck's International Law*, Ch. 4, Sec. 24, p. 140, it is said:

“Where the river abandons its ancient bed and forms a new channel, or where a lake leaves its former banks and forms a new lake, or a series of new lakes, the boundaries of the states remain in the abandoned bed of the river, or in the position formerly occupied by the lake.”

In *Sandar's Justinian*, pp. 168, 169, the rule is stated:

“If a river, entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent that their respective estates adjoin the banks. The new bed follows the condition of the river, that is, it becomes public, and if after some time the river returns to its former channel, the new bed again be-

comes the property of those who possess the lands contiguous to its banks."

In *Missouri v. Nebraska*, 196 U. S. 23, the Court, after reviewing the cases of *New Orleans v. United States*, 10 Peters, 662; *Missouri v. Kentucky*, 11 Wall. 395; *Indiana v. Kentucky*, 136 U. S. 479, and *Nebraska v. Iowa*, 143 U. S. 359, in a case of disputed boundary line between those states growing out of an avulsion, declared that the boundary line remained "*in the center of the old channel*," and thus defined that center:

"Manifestly these observations cover the present case and make it clear that the boundary line between Missouri and Nebraska in the vicinity of Island Precinct cannot be taken to be the middle of the channel of the Missouri river, as it has been since the avulsion of 1867 and now is, but must be taken to be the middle of the channel of the river as it was prior to such avulsion. We cannot see that there are any facts or circumstances that withdraw the present case from the rule established in former adjudications."

196 U. S. 36.

The opinion in the above case was delivered by Mr. Justice Harlan, and that the Court had in mind that the boundary line should be in the middle of the old channel between well-defined banks is not left open to doubt by the concluding paragraph of the opinion:

"It appears from the record that about the year 1895 the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, made surveys of the abandoned bed of the Missouri river, in

the locality here in question, ascertained the location of the original banks of the river on either side, and to some extent marked the middle of the old channel. If the two states agree upon these surveys and locations as correctly marking the original banks of the river and the middle of the old channel, the Court will, by decree, give effect to that agreement; or, if either state desires a new survey the Court will order one to be made and cause monuments to be placed so as to permanently mark the boundary line between the two states. The disposition of the case by final decree is postponed forty days, in order that the Court may be advised as to the wishes of the parties in respect of these details."

196 U. S. 37, 38.

Again, in the case of *Nebraska v. Iowa*, 143 U. S. 361, the Court said this:

"It is equally well settled that where a stream which is a boundary, from any cause suddenly abandons its old, and seeks a new, bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein."

In the case of *Stockley v. Cissna*, 119 Fed. 812, the Court, in speaking of this avulsion, said:

"But this sudden change in the channel of the river did not affect the title to lands thus transferred from one side of the river to the other, nor did it alter the boundary between the states. The middle of the main channel which the river abandoned was the boundary before the formation of the cut-off channel, and that line, in the dry and abandoned bed of the river, remains the line, unaffected by the new course of the river.

The Court, speaking through Judge (now Mr. Justice) Lurton, held that the property sued for by Stockley, and which is shown on Exhibit B to the answer of the state of Tennessee as enclosed in red lines, was within the state of Tennessee, because to the left of the middle of the main channel or bed of the river as it flowed in 1823 and 1836, saying (p. 833) :

"It is clear, whatever interpretation is placed upon the ambiguous judgment relied upon to show that the defendant withdrew his plea to the jurisdiction, that the lands in dispute are on the east side of the middle line of the channel of the old river, and therefore within the boundary of the state of Tennessee, although now west of the present channel of the Mississippi river."

We submit that in the instant case the Court will not undertake to mark the channel of navigation as it existed prior to the avulsion, but will, in accordance with the authorities above reviewed, adjudge that it is the middle of the channel, meaning the bed, which marks the boundary line between the two states, modified, as we shall hereinafter see, by the rule governing reliction.

IMPOSSIBLE TO NOW MARK THE LINE OF STEAM-BOAT TRAVEL IN THE ABANDONED BED OF THE RIVER PRIOR TO THE CUT-OFF.

The opinion in the case of *Stockley v. Cissna* was rendered more than eleven years ago. At that time the Court said:

"Centenniel Island, Island 37 and the Arkansas

shores constitute now substantially one body of dry land, capable of being crossed dry shod, except in high water. Much of this new land has grown up in willows and cottonwood from eighteen inches to two feet in diameter, and both of the parties to this litigation claim to have fields now in cultivation within what before the cut-off was the bed of the old river."

119 Fed., p. 816.

In the opinion of the Court in the case of *State v. Muncie Pulp Company*, decided nearly seven years ago, and first argued in that Court nearly nine years ago, reference is made to the large size of cottonwood trees growing in the old bed. (119 Tenn. 120.) That case also shows the difficulty at that time of ascertaining even the banks of the river as they existed prior to the cut-off in 1876. The opinion referred to the fact that the witnesses testifying to the conditions in 1876 were then "old men." (119 Tenn. 121.)

As was said by this Court in *Rhode Island v. Massachusetts*, 4 Howard, 639,

"No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals."

Hence, though we may be mistaken in our insistence as to the rule of law which governs, or would ordinarily govern, in a case of this character, because of the conditions now existing, the abandoned bed of the river cov-

ered with a growth of large cottonwood and willows and other parts of it now in cultivation, it would be impossible for anyone to locate in this territory the track of navigation or the steamboat channel as it was in 1876 prior to the cut-off. What track would be taken? That track is always sinuous, curving from bank to bank to escape sand bars, snags or other obstructions, and changing with different stages of water in the river. If the flood stage of March, 1876, should be adopted, it would be at one place, probably, though, of course, not definitely known, through McKenzie Chute. To accept this would be manifestly unfair. This would put Island No. 37 in Arkansas, whereas it has always belonged in Tennessee.

On the other hand, the reconnaissance map made by Col. Suter, *made at the lowest stage of the river ever experienced*, would likewise not be fair, for that map also shows the channel of commerce, or of steamboat travel, through McKenzie Chute, which the answer denies to have been the channel of commerce at that time; and, even if it should be adjudged to have so been, the boundary line between Arkansas and Tennessee would not be along that line of travel, but between Island 37 and the Arkansas shore, as was adjudged in the cases of *Missouri v. Kentucky*, 11 Wallace 395, 401; *St. Louis v. Rutz*, 138 U. S. 226, and *Indiana v. Kentucky*, 136 U. S. 479. So the Court can see that the insistence on the part of Arkansas that the line of steamboat travel be adopted is not feasible or practicable. It could only have been followed at that time by experienced pilots using marks on the banks as guides, and now these marks are gone, and

the pilots of forty years ago are no longer known to this river, and it would be impossible for anyone to mark the line of steamboat travel through forest and field where the river once flowed.

However, because there was a survey made of the lands in Arkansas in 1823 and about that time in Tennessee, the channel of 1823 (which is conceded to be the channel of 1836), can be definitely located, and no other one can. (119 Tenn.) This brings us to a discussion of the position of Tennessee as to what should be adopted as the boundary line.

**THE BOUNDARY OF 1823 AND 1836, AS SHOWN IN
HUMPHREY'S MAP, EXHIBIT A TO THE
ANSWER; SHOULD CONTROL.**

The insistence of the state of Tennessee is, that this Court should determine the boundary between Tennessee and Arkansas along the abandoned channel to be the center of the main channel of the river as shown by the Humphreys map of 1823, which, it is conceded, represents the condition and course of the river as it flowed in 1836. This should be adopted for two reasons: First, because no other line can be run, as above shown, and, second, because the lands, if any, which after 1836 were lost by erosion by their subsequent reappearance by reliction, were restored to their former proprietors. That is the well-known rule, so far as private ownership is concerned.

Stockley v. Cissna, 119 Fed. 831;

Gentry v. Morton, 100 N. Y. 426, 53 Am. Rep. 215;
Hughes v. Birney, 107 La. 664;
State v. Muncie Pulp Co., 119 Tenn. 47, 130, 131;
Stockley v. Cissna, 119 Tenn. 135, 171, 177.

This rule has been declared as affecting the claims of nations or states, as to the appearance of an island in the Mississippi river.

St. Louis v. Rutz, 138 U. S. 226, 246;
Hardin v. Jordan, 140 U. S. 382;
Indiana v. Kentucky, 136 U. S. 479;
Missouri v. Kentucky, 11 Wall. 395.

In the case of *St. Louis v. Rutz*, the Court said:

"When land was formed again on the place where the plaintiff's land had been washed away, it became the property of the plaintiff, and although the land thus newly formed extended a short distance into the old bed of the river beyond the former shore line, such additional formation belonged to the plaintiff as a deposit on that part of the bed of the river which was owned by him in fee, and not to the state of Illinois or to any third party. Otherwise, the plaintiff would be cut off without his fault from the river front and from his riparian rights."

138 U. S. 246, 247.

In *Indiana v. Kentucky*, 136 U. S. 479, the Court held that as Green River Island was originally in the jurisdiction of Kentucky, because the waters of the Ohio river ran between that island and the state of Indiana in 1792 this brought it within the jurisdiction of Kentucky as the successor to the ancient right and possession of Virginia, and it was not affected.

"by any subsequent change of the Ohio river, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the state of Indiana."

Continuing, the Court said:

"Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the union, unaffected by the action of the forces of nature upon the course of the river."

136 U. S. 508.

In *Hughes v. Birney*, 107 La. 664, 32 So. 30, the Court was dealing with a condition brought about by a change in the course of the Mississippi river opposite the city of Vicksburg, Mississippi, which in the same year of 1876 made a new channel for itself, cutting off what had previously been DeSoto Point. The old channel became in time a lake, which was called Lake Centenniel. The lake began to fill up and gradually became dry land fit for cultivation and habitation. The owner of the northern extremity of DeSoto Point which was not washed away, claimed this as accretion to her land. The Court held that the land, being subject to survey and identification, was the property of those who owned it at the time the surface was washed away, and that the doctrine of rea-

pearance of land after submergence controlled the case. The Court said:

"We are of opinion that the doctrine of reappearance of land after submergence is one that controls here, and that the principles governing the acquisition of land by accretion or dereliction are not directly determinative of the controversy, though having a bearing on the same. In *Gould on Waters*, 2d Ed., Sec. 158, it is said: 'If navigable waters owned by a state suddenly encroach upon private lands adjoining, and there are marks by which their limits could be determined, the title to the soil thus remains in the former owner, and upon a recession of the water it is restored as his property,' and after citing authorities, he concludes: 'The true solution of this dispute is to have the old lines of Sections 10, 11, 12, 14, 15 and 18 run out as near as can be, and over the restored land, and let the plaintiff, Mrs. Hughes, and the defendant, heirs of Burney, take such lands as may be found within the limits of the sections owned by them, respectively.'"

In *Hallack's International Law*, sec. 24, pp. 138, 139, the author says:

"The Roman law determined with great care the effect of changes in the distribution of waters upon the ownership of private land; and the influence of this law is manifest in the rules adopted by publicists with respect to international law."

We have seen that the rule as to accretions and erosions, as well as to avulsion, is the same when applied between nations and individuals. *Op. Attorneys General*, Vol. 8, pp. 175 *et seq.*; *Nebraska v. Iowa*, 143 U. S. 359; *Citing Gould on Waters*, sec. 159; *Trustees of Hopkins 8 Porter 9.*

The Supreme Court of Tennessee held the rule as to reliction to be applicable between the states, at least so far as its title was concerned, in the case of *State v. Muncie Pulp Company*, 119 Tenn. 131. Court said:

"This was the rule of the common law, and it applies, as is fully shown in the authorities we have cited, in favor of the state and of individuals, and as well to the cases of emergence of lands which have in all times been covered by the sea or navigable rivers, as well as those which have been submerged and reappeared again. If the soil under the waters belonged to an individual, the dry land appearing is his property; and if the submerged soil belonged to the state, when it is abandoned by the waters and becomes habitable and susceptible of cultivation, it remains her property. Clearly, the position of the defendants, that the state is not entitled to recover the portion of the channel covered by the grants to Huddleston, Triggs and Chalmers, is sound. These parties, or their assigns, are entitled to them. *Morris v. Brooke, supra*, 2 Bl. Com. 262; *Hale, de Jure Maris*, chs. 4 and 6. . . .

"The same rule that entitles those parties to their lands when abandoned by the river also entitles Tennessee to its original one-half of the river bed. This is the natural and necessary result of the avulsion. The effect of it was to press back the line of the state, as it ran at low-water mark, to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantee and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the line between the two states, so as to restore to Tennessee what it held before the erosions upon its banks. The right rights of those grantees, and the right of Tennessee of resoration to their lands was one of the vested to be restored to her share of the original channel

was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted.

"It restores all parties to their original status, and does justice to the mall. If the result of the avulsion had only affected the waters of the river, so far as to cause them to recede from the lands of the riparian proprietors on the Tennessee bank and occupy the channel as it existed in 1823, it would not be denied that the line would now be the center of the bed as it was in 1823. That the entire old bed was abandoned cannot change the rights of the parties. The others interested cannot be restored to their own by the forces of nature, and Tennessee entirely eliminated and denied any benefit of the reliction of the waters. She cannot in this way be deprived of the property, when the same can without doubt be identified and located."

The same was practically decided by the Circuit Court of Appeals for the Sixth Circuit in the case of *Stockley v. Cissna*, 119 Fed. 812, where, after considering whether the dry bed of the river would be considered an accretion to the Tennessee shore, and deciding that it would not, Mr. Justice Lurton said:

"Not having been within the meaning of the Tennessee acts which provided for the disposition of the unoccupied and ungranted land of the state at the time these acts were passed, the *locus in quo* had not been brought within the terms of these acts by the subsequent extraordinary physical change which has occurred. The dry river bed is public property, held by the state for public purposes; but some further legislation by the state is necessary before such a property will become open to private ownership. There was no such state of evidence as would justify

the Court in instructing the jury that the premises included in the grant below low-water mark of 1824 was an addition by accretion to the lands granted prior thereto and bounded by the river, or that the change which had occurred had been so sudden as not to be regarded as an accretion. In either case, the grant was ineffectual to give title to the plaintiff. There was, therefore, no error in an instruction to find against the plaintiff."

119 Fed. 828.

The text-writers upon international law, as well as the adjudged cases, have uniformly applied the same principles in deciding the boundary between states as between private individuals.

In *Rhode Island v. Mass.*, 12 Pet. 654, 734, this Court said:

"No court acts differently in deciding on the boundary between states than on lines between separate tracts of land."

In *Nebraska v. Iowa*, 143 U. S. 361, the Court said:

"These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion had no effect on boundary, but leaves it in the center of the old channel." (P. 361.)

No good reason has been suggested why the doctrine of reliction should not obtain. So far as private owners

in Tennessee are concerned, they would be entitled to have their lines run to the low-water mark of the river as it flowed in 1823, and land-owners in the state of Arkansas would be entitled, where the Arkansas bank had washed away, as is confessedly the case north of Island No. 37, to have their lines run as they were, to the high-water mark of the river, in 1823. The sovereign States of Arkansas and Tennessee, who own the bed of the river, would be entitled to have the land which was under the river and submerged by its waters, restored to them to the boundary line between the two states—that of Tennessee from low-water mark on the Tennessee shore to the center of the bed of the river, and Arkansas from high-water mark on the Arkansas shore to the center of the channel of the river.

It is easy to see how any other theory would work injustice to all concerned. Let it be supposed that the river around the north of Island No. 37 had in 1876 by erosion from the Arkansas bank and accretion to Island No. 37, so extended north, and the river had so filled up as that at that place it was only one-half of a mile wide; and let it be conceded that the State of Arkansas had lost by erosion from 1823 to 1876 one-half of a mile. Thus, the entire river bed would, in 1876, cover lands once belonging to Arkansas, in accordance with survey of 1823. If the doctrine of reliction is not adopted, and if the mid-channel of 1876 should be made the hard and fast rule, it is easy to see that the State of Arkansas would lose three-quarters of a mile of territory, for land-owners in

Arkansas would gain by reliction to the middle of the then channel, which would be one-quarter of a mile from the bank. Thus they would lose one-quarter of a mile of land. Tennessee, on the other hand, would have one-quarter of a mile of land which was once a part of the lands surveyed in Arkansas, and the entire mile of the original river bed. The statement of this proposition, which from the Suter's map would appear to be the condition north of Island No. 37, is its own refutation.

**NO OTHER RIVER BED THAN THAT OF 1823 CAN
NOW BE ASCERTAINED OR LOCATED.**

The bill and answer both refer to the previous cases of Stockley v. Cissna, 119 Fed., 812, and State v. Muncie Pulp Company, 119 Tenn., 47. The court will, however, look to the decision in these states, because they are practically made parts of the pleading. But if they were not so made, it would do so.

In State v. Pulp Company, 119 Tenn., page 121, the difficulty of locating the bank of the river in 1876, much less the center of the stream, is thus referred to by Mr. Justice Shields:

"There is also testimony of several witnesses tending to show that there is an elevation along the old river channel, considerably west of the original Dean's Island bank, which they took to be and called the bank of 1876. This is mere speculation upon the part of these witnesses. They did not reside in the neighborhood previous to 1876, and they know nothing of the condition of things as they then existed. The witnesses examined in the case, old men who

have lived in the neighborhood all their lives, and are familiar with the country and with the effects of freshets in the Mississippi river, say that there is no such bank; that what the defendant's witnesses took for the banks are mere ridges or banks thrown up by the action of the water of the river during freshets, when the old bed was flooded, and the depressions near those banks were channels that were washed out on such occasions.

"While all the matters which it is insisted this character of testimony tends to establish are circumstances to be considered in ascertaining the ultimate fact of whether there were or were not accretions to Dean's Island previous to the avulsion, yet they are of a conjectural and speculative character, and cannot be held to outweigh or even equal the positive and uncontradicted testimony of witnesses who testify from personal knowledge and observation of the events and facts which they had the opportunity and which it was their interest and duty to observe and know. The statements of these living witnesses of the condition and location of the river and its banks at the place in question are reasonable and consistent with the admitted facts and the history of such occurrences, and we have no doubt but that they were true.

"The question involved is the location of a boundary line. Its location in 1823 may be said to be a conceded fact. Every presumption is in favor of the permanency of the location of such lines. It is of the highest importance that their location should be certain and fixed. When a claim is made that a line of this character has been changed by the forces of nature, it must be supported by the clearest and most satisfactory evidence. This has not been done by the defendants in this case." Pp. 121, 122.

The map of Col. Suter is shown in that case to have